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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 618

FORTNIGHTLY CORPORATION, *Petitioner*,

v.

UNITED ARTISTS TELEVISION, INC., *Respondent*.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF

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** So cited herein. The official title is followed by the description, "Second Report and Order". It is indexed in 2 FCC 2d as "CATV".

*** So cited herein. The lengthy official title is followed by the description, "Memorandum Opinion and Order". It is indexed in 6 FCC 2d as "CATV".

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF

QUESTIONS PRESENTED

1. Whether when petitioner receives a television broadcast of a copyrighted motion picture, amplifies and otherwise processes it electronically, and then relays and distributes it by cable to the television receiv-

ing sets of its 15,000, or so, paying customers, petitioner publicly performs such copyrighted motion picture in any manner or by any method whatsoever, within the meaning of sections 1(c) and 1(d) of the Copyright Act; *and, if so,*

2. Whether by licensing the television broadcast of the motion picture, its copyright owner, as a matter of law, loses his exclusive right under sections 1(c) and 1(d) of the Copyright Act to perform it publicly to such extent that petitioner does not infringe such right when, without authority of the copyright owner, it so publicly performs it; *or*

3. Whether the Communications Act or policies thereof create, or warrant the creation of an exception to the exclusive right of copyright owners under sections 1(c) and 1(d) of the Copyright Act to perform their works publicly, so that when a television station broadcasts a copyrighted motion picture with the consent of its copyright owner, petitioner infringes no such right in so performing it publicly (a) anywhere, or (b) anywhere within the theoretically predicted boundary of the widest service area of such television station, its so-called Grade B contour.

STATEMENT

(a) *The proceedings below.* Respondent, as the owner of the copyrights in certain motion pictures, brought this action against petitioner for infringement of its exclusive right to perform them in public in any manner or by any method whatsoever, granted by sections 1(c) and 1(d) of the Copyright Act. A 21-23, 130-154; Pet. B. 10[illegible].

Petitioner's answer raised numerous issues, and the District Court by pre-trial order separated two of such issues for prior trial and determination. A 25, 26, 155-183, 187, 188. The decision of the Court of Appeals here under review, affirmed, upon an interlocutory appeal under Tit. 28 U.S.C. § 1292(b), the non-final decision of the District Court, 255 F. Supp. 177; A 19-107, in respect only of such two issues. A 1343; 377 F. 2d 872. In its opinion, A 1344-5; 377 F. 2d at 874; the Court below succinctly described the two issues before it as follows:

> This interlocutory appeal * * * presents the question whether the * * * CATV * * * systems operated by defendent [i.e., petitioner] * * * infringed the exclusive right of plaintiff [i.e., respondent] * * * to perform its copyrighted motion pictures in public * * * by receiving and transmitting by coaxial cable to their paying subscribers the signals of television broadcasting stations * * * which were licensed to broadcast the motion pictures. A further issue is whether, if defendant's CATV system did perform plaintiff's copyrighted motion pictures in public, they had a license implied in law to do so.

The issues reserved by the District Court for subsequent trial and determination, *and which are yet to be tried,* have been described by petitioner in general terms adequate for present purposes, as follows, Pet. 9, fn. 4:

> Reserved under the pre-trial order for subsequent trial were affirmative defenses * * * including issues concerning the validity of the plaintiff's [i.e., the respondent's] asserted copyrights, the existence of a license implied in fact by reason of

(among other things) plaintiff's course of conduct in dealing with television stations, and the issue of estoppel, as well as copyright misuse and antitrust defenses and the question of damages.

(b) *The facts.* Three television broadcasting stations in Pittsburgh, Pa., and one each in Wheeling, W. Va. and Steubenville, Ohio,[1] broadcast certain motion pictures under licenses of respondent as their copyright owner. Without respondent's consent, petitioner, a private business corporation, in operating its two so-called CATV systems, commercially and for profit, received such broadcasts, amplified and otherwise processed them electronically, and then relayed and distributed them by cable to television receiving sets in the homes and commercial establishments of its 15,000, or so, paying customers in and about Clarksburg and Fairmont, W. Va., Pet. B. 3, 4, 8-10; A 36-38, 1346.[2]

In so doing, petitioner employed highly sophisticated electronic equipment having an estimated replacement value of between $750,000 and $1,000,000. A 38, 44-59, 970-973, 1347-1349; E 267, Pet. B. 8-12.

Petitioner's estimated annual revenue from its 15,000, or so, paying customers was in the neighborhood

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[1] KDKA-TV, WIIC-TV and WTAE-TV, in Pittsburgh, WTRF-TV in Wheeling and WSTV-TV in Steubenville.

[2] "Pet. B" references are to the petitioner's brief; "Pet." references are to the petition; "A" references are to the first three volumes of the Appendix; and E references are to the fourth, or exhibit volume of the Appendix. "U.S. Mem." references are to the memorandum for the United States. For definitions of a CATV system, see Brief for the United States, etc., in *U.S.* v. *Southwestern Cable Co.*, No. 363, Oct. T. 1967, p. 3, and fn. 3, p. 3.

of, and probably exceeded $675,000. E 180.[3] Between 1953 and 1963, petitioner's customers increased from fewer than 3,000, to more than 15,500, and as the Court below noted, by 1960 the number of petitioner's customers "was over half the number of occupied housing units counted by the United States Census of Housing in the area" that year. A 219-20, 1346-7. More precisely, the figure for Clarksburg appears to have been about 72 percent and that for Fairmont, about 73 percent. A 37, 775-6; E-261.

Clarksburg is beyond the theoretically predicted boundary of the widest service area—the so-called Grade B contour calculated under regulations of the Federal Communications Commission—of each of the three television broadcasting stations in Pittsburgh, as well as that of the station in Steubenville. It is, however, within the Grade B contour of the station in Wheeling. Fairmont is beyond the Grade B contour of one of the Pittsburgh stations, but within the Grade B contours of the station in Wheeling and of another of the Pittsburgh stations, and is on those of the Steubenville, and the third of the Pittsburgh stations. E 394, 397, 401, 405, 409; A 1364. As the Court below noted, A 1364:

> The Grade B contour, calculated on the basis of the height of the station's transmitting antenna

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[3] While the record does not show petitioner's profits, it has been reliably reported that so-called cable television or CATV companies such as petitioner have had profit ratios ranging up to 72 percent of revenues and 59 percent of capital, i.e., fixed equipment before depreciation. Seiden, *An Economic Analysis of Community Antenna Television Systems and the Television Broadcasting Industry, Report to the Federal Communications Commission* (Government Printing Office, 1965) Table 9 at p. 28; Table 10 at p. 30.

> and of the terrain within a two-to-ten mile radius of the antenna in accordance with tables prescribed by the Federal Communications Commission, mark the boundary along which service "acceptable to the media observer" is *theoretically* expected to be available *90 per cent of the time at the best 50 per cent of the locations.* See 47 C.F.R. § 73.684; FCC Sixth Report and Order on Television Allocations, 1 (Part 3), 91 Pike & Fischer R.R. 601, par. 97 (1952) [Emphasis supplied]

Contrary to such theoretical prediction, however, as petitioner points out, because of the nature of the terrain in the Clarksburg-Fairmont area, "television reception there has not been easy". Pet. B. 7. In fact, as the Court below observed, petitioner's own expert testified that satisfactory reception of the broadcasts of television stations in Pittsburgh, Wheeling or Steubenville might be expected *in only 10 to 15 percent of the locations in and about Fairmont, and in only 1 to 5 percent of the locations in and about Clarksburg.* A 910-913, 1365, fn. 14.[4] Thus, so far as concerns the Clarksburg-Fairmont area, it is clear that the *facts* fell far short of the *predictions* made under the regulations of the Federal Communications Commission, and the Court below rejected the predicted B

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[4] The Court below held that "there was no testimony", in effect, that any television set connected to petitioner's cable was at any such favored location, or, in other words, that, on the record, it does not appear that any of petitioner's customers could have received the broadcasts of the Pittsburgh, Wheeling or Steubenville television stations satisfactorily "off the air". A 1365, fn. 14; A 35, 36. While petitioner attacks this holding strenuously, it points to nothing in the record which refutes it. Pet. B. 85, fn. 111. Indeed, it could not. E 97, 103, 228, 234, 235, 237, 239, 258. The Solicitor General appears to agree that there was no showing that any of petitioner's customers could have received the broadcasts in suit off the air. U.S. Mem. 12.

contours of these television stations "as an approximate measure of the range of normal reception" of their broadcasts, for the very reason that, A 1365, fn. 14:

> the contours are mere theoretical estimates calculated without regard to actual terrain or interference conditions and, *as the record here demonstrates,* "under actual conditions, the true coverage may vary greatly from these estimates". 47 C.F.R. §683(a). [Emphasis supplied] [5]

The caveat quoted by the Court below is from the Federal Communications Commission's regulation prescribing the method of calculating broadcasting stations' contours, and, with specific reference to the picking-up and retransmission of broadcasts for profit by entrepreneurs [6] such as petitioner, the Commission has said, *First Report and Order,* 38 FCC 683, 730, 731 (1965);

> In dealing with * * * the carriage * * * requirements, we have made liberal use of the * * * contour concepts * * *. * * * these references were entirely to predicted contours. As we have stated several times, however, signal contours are, in the present context, useful rules of thumb. And, as we have repeatedly recognized, the methods of prediction * * * are based on * * * assumptions as to terrain and other factors, which may not necessarily hold true in an individual instance. In the absence of other information, predictions based on our rules will be regarded as creating a prima facie presumption as to the location of signal con-

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[5] The petitioner itself concedes, Pet. B. 95, 96, that:

> While recognizing that actual service may vary from the prediction, the Commission has recognized and employed the B contour as the rule-of-thumb measure of a station's normal coverage area * * *.

[6] The term is petitioner's. See, e.g., Pet. 44, 46.

> tours. * * * however, any party, will be free to make a showing that, because of terrain or other factors, the contours lie elsewhere.

Thus, even assuming, *arguendo,* that the B contour has relevancy, its actual location is always open to a showing that it lies elsewhere than as predicted in accordance with the Federal Communications Commission's regulations. Here, as the Court below has found, A 1365, fn. 14, "the record * * * demonstrates" that off the air reception in the Clarksburg-Fairmont area of broadcasts of Pittsburgh, Wheeling and Steubenville stations did not in fact meet the B contour requirements of the Commission.

The Clarksburg-Fairmont area has not been dependent for television service on the stations in Pittsburgh, Wheeling or Steubenville. For, two local television stations have been broadcasting, one from Clarksburg since 1957, and another from Weston, W. Va., since 1960.[7] A 1286-1288. While the record is silent as to the Weston station, it is clear that broadcasts of the Clarksburg station have been readily and satisfactorily received off the air in the Clarksburg-Fairmont area. A 743, 1303. The Clarksburg-Fairmont area is within the boundaries of the predicted A contours of both such stations, calculated in accordance with the Federal Communications Commission's regulations.[8] Ac-

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[7] WBOY-TV in Clarksburg, and WJPB-TV, now WDTV, in Weston.

[8] Certified predicted contour maps of both stations, on file with the Federal Communications Commission, are being lodged by respondent with the Clerk of the Court. See, Pet. B. 12, 13. The predicted A contour, which demarks an area closer to a broadcasting station than its predicted B contour, marks the boundary along which service acceptable to the median observer is expected to be available at least 90 percent of the time at the best 70 percent of locations. Pet. B. 13, fn. 13; Brief of the United States, etc. in *U.S.* v. *Southwestern Cable Co.*, No. 363, Oct. T. 1967, p. 15, fn. 13.

cordingly, any part of the Clarksburg-Fairmont area within the predicted B contour of any of the broadcasting stations in Pittsburgh, Wheeling or Steubenville, is also within the predicted A contours of the broadcasting stations in Clarksburg and Weston. Operating in the same area, petitioner and the broadcasting station in Clarksburg—and presumably the station in Weston—were, naturally, in competition with one another for viewers on the basis of the programs they offered. A 35. See, e.g., E 99, 100, 115, 204, 221, 222, 223. The issue here is, simply whether petitioner, like the Clarksburg and Weston stations, should pay for its use of copyrighted programs.

Petitioner's retransmission of broadcasts of copyrighted motion pictures without the copyright owner's consent, is in contrast with the strenuous objection it made when the Clarksburg television station—one of its customers—without petitioner's consent, rebroadcast over its own facilities a broadcast of a Pittsburgh television station it had received on petitioner's cable. A 794-798; E 262-264.

(c) *The decisions of the Courts below.* Both Courts below held for respondent on both issues before them, concluding that in doing what it did, petitioner publicly performed the copyrighted motion pictures within the meaning of sections 1(c) and 1(d) of the Copyright Act, and that petitioner did not have a "license implied in law" so publicly to perform them. A 19-107, 1343-1367; 255 F. Supp. 177; 377 F. 2d 872.

SUMMARY OF ARGUMENT

1. In holding that "the technical means by which the result is produced are irrelevant", and that petitioner "performed" and "publicly" performed copyrighted motion pictures when it received, relayed and distributed television broadcasts of them to its thousands of customers, the Court below applied in the case of a new technology, basic and well-settled legal principles which have been applied by this Court in cases of earlier new technologies. The exclusive right of a copyright owner to "perform" his copyrighted works "publicly" extends expressly to all such performances "in any manner or by any method whatsoever", no matter how new or novel, and extends to wholly new technologies whose advent is still in the future. The essence of "performing" a work lies in communicating the pictures and sounds which comprise it, in whatever form they may be, to where they will become visible and audible to prospective viewers and auditors, if they choose to see and hear them. Just as it has been held by this Court that the single rendition of a copyrighted musical selection can result, when broadcast, in more than one public performance, so, too, the single playing of a copyrighted motion picture, when broadcast, can result in more than one public performance. Petitioner's relaying and distributing of a broadcast of a copyrighted motion picture to its thousands of paying customers is itself a performance of such work, just as a broadcast is, and like a broadcast, constitutes a public performance, and not multiple private performances although petitioner's customers, like the members of a broadcaster's audience, see the "show" in the privacy of their own homes. To hold otherwise would be to fail to recognize the substance

and reality of the matter, no less than the object and intent of the Copyright Act. When petitioner tunes-in on a broadcast for its own commercial purposes, it necessarily assumes the risk that in doing so it may infringe the performing right of another.

2. A "license implied in law" is a contradiction in terms. Petitioner's claim is, actually, that as a matter of law, a copyright owner who licenses a public performance of his work by broadcast, thereby loses his exclusive right publicly to perform his work, to such extent that petitioner does not infringe it when petitioner publicly performs such work by receiving the broadcast, and then relaying and distributing it to its 15,000, or so, paying customers. But the exclusive right granted by the Copyright Act to copyright owners publicly to perform their works for profit in any manner or by any method whatsoever, extends, as this Court has held, "expressly" to *all* such performances, and no exception is made by the Act for such performances in the manner or by the method employed by petitioner, or any other. The Congress has neither expressly nor impliedly evinced any purpose or intention that there be any such exception, and the "license implied in law" for which petitioner contends is, as the Solicitor General makes clear, but a legal fiction to cloak what would be the bald establishment of an exception to the unqualified statutory rights of copyright owners, by the exercise of "judicial flexibility". This Court has held that neither principle nor authority permits any such impingement of the exclusive performing rights expressly granted to copyright owners by the Copyright Act. The "fair use" doctrine does not involve whittling away of the statutory rights of copyright owners by any such means. Nor is

"judicial flexibility" involved in decisions whether and to what extent the Copyright Act applies to technologies developed after its enactment. The licensing of public performances for profit of copyrighted works is not analagous to the sale of copies of copyrighted works, as this Court has held, and, by the same token, it is not analogous to the sale of chattels embodying a patented invention. Licenses of rights granted by copyright, and licenses of patent rights may be for limited geographic areas, and cases under the copyright, patent and antitrust laws forbidding territorial restrictions on the resale of goods and chattels are inapplicable to such licenses. In licensing a television station to broadcast his work, a copyright owner merely waives, in favor of the licensee, and no one else, his exclusive right publicly to perform his work at the time and place, and in the manner and by the method specified in the license. Since a copyright owner's exclusive right is *to perform* his work publicly, and not *to view* public performances of it, he has no "viewing rights" to license, and it is a concept alien to copyright that by licensing another publicly to perform his work, a copyright owner impliedly, or otherwise, licenses the public to view it. Even if it be assumed, *arguendo,* that the public has a "right" to view broadcasts of copyrighted works, it does not follow that petitioner may, without the consent of the copyright owner, publicly *perform* such works by relaying and redistributing such broadcasts to the public. The law provides a whole arsenal of weapons to prevent and redress misuse or abuse of copyright, and although copyright, like any other right, may be misused or abused, there is no need to sacrifice any of the good that copyright protection does, to prevent the evils of wholly conjectural restraints of trade. In principle, there is no difference

between petitioner's primary claim, which the Solicitor General rejects, to a "license implied in law", which would permit petitioner, without the copyright owner's consent, to retransmit to members of the public anywhere, broadcasts of copyrighted works, wherever they may originate, and petitioner's alternative claim, which the Solicitor General supports with a caveat, that petitioner may do so within the broadcasting station's so-called Grade B contour.

3. The Copyright Act and the Communications Act are not in *pari materia,* and the Communications Act does not expressly or impliedly repeal, amend or modify the provisions of sections 1(c) and 1(d) of the Copyright Act which expressly reserve to copyright owners the exclusive right to all public performances for profit of their works. Nothing in the legislative history of the Communications Act, or elsewhere, indicates any purpose or intention of the Congress that the Communications Act should have any such consequence. Any "right" of individual members of the public under the Communications Act to view broadcasts does not encompass a right to retransmit broadcasts of copyrighted works for profit to other members of the public without the copyright owner's consent. The Solicitor General and petitioner, to support their position that an exception should be established to the clear statutory right of copyright owners, for the commercial retransmission of the broadcast of a copyrighted work within the Grade B contour of the television station broadcasting the work, invoke "communications * * * policy with regard to CATV". But, the only communications policy with regard to CATV is to lessen the competitive advantage that CATV has had over broadcasters because broadcasters pay for their copyrighted programs, while CATV neither pays for its programs, nor honors

the rights of broadcasters to exclusivity under their licenses. Such policy was specifically adopted by the Federal Communications Commission as subordinate to copyright, and expressly for the sole purpose of remedying the unhealthy consequences of the inability, up to now, of copyright owners to enforce their rights in respect of retransmissions of television broadcasts of their works. The Solicitor General and petitioner would have this Court, in topsy-turvy fashion, give primacy over copyright policy, made plain by the Congress in the Copyright Act, to a communications policy, adopted by the Federal Communications Commission grounded on no communications need other than to alleviate the evils resulting from the nonenforcement of the very rights of copyright owners that the decision of the Court below would enforce.

The *a priori* "economic realities" on which the Solicitor General and petitioner rely have no foundation in the record, and, in large measure, appear to have no foundation in fact, and are contrary to respondent's experience and understanding. The Grade B contour concept is the *theoretically predicted* widest service area of a broadcasting station, computed under regulations of the Federal Communications Commission, on the basis of assumptions as to terrain and other factors which may or may not conform to the fact in any given case. The Commission considers it a mere "rule of thumb". Here, as the Commission has acknowledged might occur in any case, the fact falls short of the theoretical prediction, and the Grade B contours of the broadcasting stations in suit are beyond their actual service areas, which do not include the territory into which petitioner retransmitted their broadcasts of respondent's works. The Grade B contour is a concept

developed by the Federal Communications Commission to serve administrative needs, and is subject to modification or abandonment by the Commission, as those needs change, or when some other concept serving the Commission's administrative needs better, is developed. It would be anomalous to tie an exception carved out of the rights of copyright owners under the Copyright Act to an administrative regulation of an agency having no responsibility for copyright, and which can be modified or abandoned by such agency at any time for reasons wholly alien to copyright. The "economic realities" on which the Solicitor General relies cannot serve to create an exception to the statutory rights of copyright owners. The "limited license" proposed by the Solicitor General, is no less than the broader license for which petitioner primarily contends, "inconsistent * * * with the terms of the statute, existing precedents * * * [and] sound policy", to use the Solicitor General's words.

ARGUMENT

I

THE COURT BELOW CORRECTLY CONCLUDED THAT IN DOING WHAT IT DID, PETITIONER PUBLICLY PERFORMED THE COPYRIGHTED MOTION PICTURES WITHIN THE MEANING OF SECTIONS 1(c) AND 1(d) OF THE COPYRIGHT ACT.

(a) *Petitioner "performed" the copyrighted works.* The jargon of electronics, to which petitioner resorts to describe the "sole activity by which" it claims it is "alleged to have 'performed' the copyrighted motion pictures", Pet. B. 12, is descriptive not of what petitioner does, but, rather, of how it does it. In petitioner's predecessors' words on other occasions, what petitioner does is, E 3, 15, 34, 53, 72:

> to * * * operate a system of distributing and relaying television broadcasts and *other* communica-

> tions of pictures, sounds and other signals of all kinds by means of wire, cable, or other like connections to television or other receiving sets of subscribers to its service * * *. [Emphasis supplied]

It is patently futile to argue that when petitioner engages in "distributing and relaying television broadcasts" which are "communications of pictures [and] sounds" comprising copyrighted motion pictures, it is not "performing" them. For, the essence of "performing" a work lies in communicating the pictures and sounds which comprise it, in whatever form they may be, to where they will become visible and audible to prospective viewers and auditors, if they choose to see and hear them. Cf. *Kalem Co.* v. *Harper Bros.*, 222 U.S. 55, 61 (1911).

It is, of course, immaterial whether such communication is effected by unaided or projected light and sound waves, by emitting radio and television waves, or, as petitioner does, by amplifying, processing and retransmitting the electromagnetic radiation of television broadcasts. For, the exclusive right reserved to copyright owners by sections 1(c) and 1(d) of the Copyright Act is, explicitly, to perform their works publicly "in any manner or by any means whatsoever". As this Court held in *Kalem*, 222 U.S. at 61, "the essence of the matter * * * is not the mechanism employed, but that we see the event or story lived". Nothing in *White-Smith Music Publishing Co.* v. *Apollo Co.*, 209 U.S. 1 (1908), on which petitioner relies, Pet. B. 29-33, militates against this conclusion.

In *White*, the question was whether a player-piano roll was a "copy" of "a musical composition" copyrighted under the provisions of a former act, which

gave the copyright owner "the sole liberty of copying * * * the same". The composition as copyrighted was in the form of sheet music, in familiar staff notation. In holding that a player-piano roll was not a "copy" of such sheet music, this Court pointed to: (1) Prior decisions of lower federal courts, and of English courts, to that effect, followed by a series of amendments to the Copyright Act which left such decisions undisturbed. This, this Court noted, 209 U.S. at 14, "might well be taken to be an acquiescence in the judicial construction given to the copyright laws"; (2) The extension by the Congress of the benefits of the copyright laws to foreigners, in the face of an international copyright convention, to which the United States was not a party, but which clearly provided that the manufacture and sale of such devices as player-piano music rolls were not infringements of copyright. The Court noted, 209 U.S. at 15, that "It could not have been the intention of Congress to give foreign citizens * * * advantages in our country which, according to that convention, were to be denied to our citizens abroad"; (3) Old judicial decisions defining "copy" to mean, in effect, a facsimile copy only. The Court noted, 209 U.S. at 17, that "When the combination of musical sounds is reproduced to the ear it is the original tune as conceived by the author which is heard." These musical tones are not a "copy" of the "tangible thing" for which the statute "has provided for the making and filing" and "against the * * * duplication of which it is the purpose of the statute to protect the composer".

Thus, the Solicitor General's statement, U.S. Mem. 7, that *White* involved a "new development not contemplated by Congress" is manifestly incorrect.

On the contrary, this Court plainly held in *White* that player-piano rolls had, indeed, been contemplated by the Congress, and that the Congress had manifested an intention that they not be considered "copies". And, whatever may have impelled this Court to construe the naked word "copy" narrowly in *White,* no such consideration can obtain here in the construction of the phrase "to * * * perform * * * in any manner or by any method whatsoever". For, the Congressional mandate is plainly that "to perform" be most broadly construed, both as to what constitutes a performance, i.e., its "manner", and as to the means by which a performance is effected, i.e., the "method" employed.

Moreover, *White* was concerned solely with the copyright owner's exclusive right to "copy", and the Court noted, 209 U.S. at 16, that "There is no complaint in this case of the public performance of copyrighted music; nor is the question involved whether the manufacturers of such * * * music rolls when sold for use in public performance might be held as contributing infringers". Copying and performing are, manifestly, quite different matters, both conceptually and factually, although the Copyright Act gives the copyright owner the exclusive right to both. *Remick Music Corp.* v. *Interstate Hotel Co. of Nebraska,* 58 F. Supp. 523 (D. Neb. 1944), aff'd 157 F. 2d 744 (8th Cir. 1946), cert. denied 329 U.S. 809 (1947). In *Jerome H. Remick & Co.* v. *American Automobile Accessories Co.,* 5 F. 2d 411; 412 (6th Cir. 1925), cert. denied 269 U.S. 556, the Court held that "nothing in *White-Smith Music Co.* v. *Apollo* * * * affects our conclusion", which was that a radio broadcast of a copyrighted work was a public performance of it.

Petitioner's efforts, Pet. B. 33-38, to undermine the authority and applicability of *Buck* ● *Jewell-La-*

Salle Realty Co., 283 U.S. 91 (1931) are wholly unavailing, for nothing petitioner advances diminishes one whit the force of its teaching, 283 U.S. at 198, that

> the novelty of the means used does not lessen the duty of the courts to give full protection to the monopoly of public performance for profit which Congress has secured to the composer.

The force of *Buck* becomes even more compelling when it is recognized that it arose under section 1(e) of the Copyright Act, which, in granting the copyright owner the exclusive right publicly "to perform" his musical composition for profit, does *not* use the phrase "in any manner or by any method whatsoever", which appears in both sections 1(c) and 1(d), under which this case arises. The principle embraced by *Buck* does not depend on the minutiae of what was done there, and the Court below correctly held that "the technical means by which the result is produced are irrelevant". A 1356-57, fn. 9. Contrary to petitioner's view, Pet. B. 26, there is nothing "novel" in the holding of the Court below that petitioner performed the copyrighted works, for it does no more than apply in circumstances presented by a newer technology, the basic and well-settled legal principle applied by this Court in *Kalem*, on the advent of motion pictures, and in *Buck*, on that of radio.[9]

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[9] For similar applications of the principle, see: *Jerome H. Remick & Co.* v. *American Automobile Accessories Co.*, 5 F. 2d 411 (6th Cir. 1925), cert. denied 269 U.S. 556; *Metro-Goldwyn-Mayer Distributing Corp.* v. *Bijou Theatre Co.*, 59 F. 2d 70, 76 (1st Cir. 1932); *Harms, Inc.* v. *Sansom House Enterprises, Inc.*, 162 F. Supp. 129, 134 (E.D. Pa. 1958), aff'd *sub nom. Leo Feist, Inc.* v. *Lew Tendler Tavern, Inc.*, 267 F. 2d 494 (3d Cir. 1959); *Edison* v. *Lubin*, 122 Fed. 240, 242 (3d Cir. 1903).

That the sounds and pictures of the broadcasts of the copyrighted motion pictures relayed and distributed by petitioner to its customers become audible and visible only when their customers "turn on" their television sets, Pet. B. 39, 40, is wholly irrelevant to a consideration of whether, when petitioner does what it does, it performs the motion pictures. For even in the case of the classical "live" performance of a dramatic work in the presence of a "live" audience in a theatre, the "pictures" and sounds made on the stage are visible and audible to members of the audience only when they "turn on" their eyes and ears, so to speak, to see and hear them. So, too, in the case of radio and television broadcasting—irrefutably performances—the sounds and pictures broadcast become audible and visible to the public only when they turn on their radio and television sets.

The petitioner utterly fails in its attempt, Pet. B. 43-52, to distinguish its own relaying and distribution of television broadcasts, from broadcasting itself. For, the fact remains that petitioner is engaged, for profit, in bringing to the commercial establishments and homes of its some 15,000 customers respondent's copyrighted motion pictures, to become audible and visible on television sets when turned on by somebody acting independently of petitioner. This is precisely what broadcasters do, and it can make no difference under the Copyright Act whether the electronic impulses achieving this result are transmitted over the air by a broadcaster, or are relayed and distributed by cable, as the petitioner does.

Nor is it, in this context, other than a distinction without a difference that broadcasters do the "planning, selecting and supervising" of programs, Pet. B.

48, while it serves petitioner's purpose to ride the broadcasters in "piggy back" fashion, and to relay and distribute to its customers the programs which result from the broadcasters' efforts. That petitioner thus spares itself the time, effort, and expense to which broadcasters necessarily go to arrange and acquire programs attractive to both advertisers and audiences manifestly affords no basis for concluding that the petitioner need pay no heed to the exclusive rights reserved by §§ 1(c) and 1(d) of the Copyright Act to the owners of the copyrights in the motion pictures included in the programs petitioner retransmits to its subscribers.

In any event, petitioner's premise is wholly untenable, for when it selects for relay and distribution the broadcasts of certain television stations rather than those of others, petitioner is, in a very real sense, selecting programs. The "CATV operator—not the individual subscriber—determines which stations (and sometimes which programs) will be available on the system". *First Report and Order,* 38 FCC 683, 702 (1965). Indeed, the record here is replete with evidence of petitioner's preoccupation with "programming". E 99, 101, 102, 203, 206, 207, 216, 224; A 34, 35.

In rejecting a similar contention in *Buck,* this Court said, 283 U.S. at 198, 199:

> The defendant contends further that the acts of the hotel company were not a performance because * * * the operator of a radio receiving set cannot render at will a performance of any composition, but must accept whatever program is transmitted during the broadcasting period. * * * One who hires an orchestra for a public performance for profit is not relieved from a charge of infringement

> merely because he does not select the particular program to be played. Similarly, *when he tunes in on a broadcasting station, for his own commercial purposes, he necessarily assumes the risk that in so doing he may infringe the performing rights of another.* [Emphasis supplied]

Petitioner grasps at a shadow and lets the substance escape when it urges, Pet. B. 45, 46, that a broadcasting station's admitted public performance is to be found, not in the broadcast but, rather, in the "live rendition" in the studio. Indeed, petitioner itself demonstrates the hollowness of this contention when it concedes, Pet. B. 47, that a broadcaster nevertheless performs when he "dispenses with the live performance in his studio and substitutes the playing of a record, tape or motion-picture film, or a program supplied to him * * * by a network". For, the District Court's finding, fully substantiated by the record, A 342-3, 366-8, 370-1, 943, and expressly adopted by the Court below, A 1354, text and fn. 7, is, A 73, 74:

> That plaintiff's copyrighted motion pictures are not visible or audible until they reach the subscriber's television sets emphasizes, rather than contradicts, the essential similarity between a CATV system and a broadcasting station and the dissimilarity between a CATV system and a home receiving set. Indeed, except in the comparatively rare instances where a broadcasting station has a live performance in its own studio, there is nothing visible or audible at the broadcasting station. Even when a broadcasting station originates programs by transducing motion picture films or videotapes into electromagnetic energy, there is nothing visible or audible to an observer at the station. The projection of the film in a television studio is on a small photosensitive surface within a camera tube. The fact that in CATV operations, as in

> the case of a broadcasting transmission, nothing is visible or audible in the process of transmission demonstrates the dissimiliarity between CATV and a home receiver, on the one hand, and the similarity between CATV and a broadcasting station, on the other.

(b) *Petitioner's performances of the copyrighted works were public performances.* Petitioner's argument, Pet. B. 39-43, that the "simultaneous viewing" by its customers of the broadcasts it relayed and distributed to them, if a performance, was not a public performance on its part, is based on a fundamental misconception of copyright law. The exclusive right granted to copyright owners by sections 1(c) and 1(d) is *to perform* their works in public, *not to view them.* Accordingly, *viewing* a public performance of copyrighted work does not infringe the copyright owner's exclusive right. This is true whether the viewers are members of a live audience in a theatre where a live performance is being given on the stage, or are in their own homes or business establishments watching television broadcasts received "off the air", or by means of petitioner's cable. Thus, that petitioner's customers do not infringe by watching the broadcasts petitioner relays and distributes to them, has no bearing on whether petitioner performs them publicly when it relays and distributes such broadcasts to its customers. The Court below was clearly correct in holding, A 1350, 1356, that

> * * * the simultaneous viewing of plaintiff's copyrighted motion pictures on the television sets of as many as several thousand of defendant's subscribers—is fairly characterized as a public performance infringing the copyrights.

* * *

> * * * it seems clear to us that when * * * defendant * * * enables several hundred of its subscribers to view a program simultaneously, it is engaging in one public performance, not several hundred private ones.

Petitioner's concept of "multiplicity of private performances", Pet. B. 41, was advanced over forty years ago, in the early days of radio broadcasting, and was rejected in terms that have stood the test of time. Thus, in *Jerome H. Remick & Co.* v. *American Automobile Accessories Co.*, 5 F. 2d 411, 412 (6th Cir. 1925), cert. denied 269 U.S. 556, the Court said:

> A performance, in our judgment, is no less public because the listeners are unable to communicate with one another, or are not assembled within an inclosure, or gathered together in some open stadium or park or other public place. *Nor can a performance, in our judgment, be deemed private because each listener may enjoy it alone in the privacy of his home.* Radio broadcasting is intended to, and in fact does, reach a very much larger number of the public at the moment of the rendition than any other medium of performance. [Emphasis supplied.]

In *Messager* v. *British Broadcasting Company, Ltd.*, 138 L.T. 571, 572-3 (C.A. 1928), [1928] 1 K.B. 660 (C.A.) Mem., cited by this Court in *Buck*, 283 U.S. at 197, fn. 3, Lord Justice Scrutton said:

> * * * in the Court below they [i.e. the broadcasters] said—and I admire their courage in saying it—that though they were giving a performance to be heard by hundreds of thousands of people, it was not a public performance. As I say, I admire their courage in saying it.

> McCardie, J., who tried the case, found, as one would expect, that it was a public performance * * *.
>
> * * * in this Court their courage failed them, and very properly, if I may say so, they have not argued that intentionally to talk to 100,000 people is not a public performance * * *.

Mr. Justice McCardie had ruled, [1927] 2 K.B. 543, 548, 549:

> If I did not hold this to be a public performance by the defendants I should fail to recognize the substance and reality of the matter and also the object and intent of the Copyright Act.

Obviously, the performance to which Scrutton, L.J., and McCardie, J., were addressing themselves was the one directed by radio to "100,000 people", not, as petitioner claims, Pet. B. 46, the "live" performance in the "private studio", attended only by "officials and a few friends".

That the broadcaster is himself engaged in publicly performing the copyrighted motion picture when he broadcasts it, does not affect the character of petitioner's simultaneous retransmission of the broadcast to its thousands of customers, as itself being a public performance. Thus, in *Buck,* 283 U.S. 191, 197-198, this Court said:

> The defendant next urges that it did not perform because there can be but one actual performance each time a copyrighted selection is rendered; and that if the broadcaster is held to be a performer, one who, without connivance, receives and distributes the transmitted selection cannot also be held to have performed it. But nothing in the act circumscribes the meaning to be at-

> tributed to the term "performance," or prevents a single rendition of a copyrighted selection from resulting in more than one public performance for profit. While this may not have been possible before the development of radio broadcasting, the novelty of the means used does not lessen the duty of the courts to give full protection to the monopoly of public performance for profit which Congress has secured to the composer. * * * No reason is suggested why there may not be more than one liability.

What this Court thus said is equally applicable here, although what petitioner has done was not possible before the development of CATV.

(c) *The Court below fashioned no "new doctrine of infringement by contribution", and devised no "new theory of contributory performance".* The "new doctrine of infringement by contribution" which petitioner perceives in the decision of the Court below, Pet. B. 39, is a mere play on words. Petitioner purports to find this new doctrine, Pet. B. 40, in the holding of the Court below, A 1353, 1354, that:

> Defendant appears to concede that, under *Jewell-LaSalle* and *SESAC*, its CATV systems would perform broadcast television programs if they furnished television sets to their subscribers; but it argues that the fact that they do not is conclusive. Given the ready availability of television sets from other sources, however, defendant's decision not to provide them is wholly outweighed by the magnitude of *its contribution* to the viewing of broadcast television programs by its subscribers, just as *SESAC* and (by implication) *Jewell-LaSalle* held that the fact that the hotels' guests individually made the actual decisions to turn on a program and to listen to it did not negate a per-

> formance, because the hotels had done so much to provide signals which could be made audible at will. [Emphasis supplied]

This, obviously is no doctrine of contributory infringement as petitioner claims, Pet. B. 40, but is, rather, merely an appraisal by the Court of the extent to which petitioner was responsible for having brought into the homes and commercial establishments of its 15,000, or so, paying customers, broadcasts of respondent's copyrighted motion pictures. The Court below made a similar appraisal in other language on the previous page, A 1352-53:

> Defendant's CATV systems did far more to bring about the viewing of television programs by their subscribers than the LaSalle Hotel and the Hotel Pennsylvania did to provide radio programs for their guests.

Thus, the fanciful "new doctrine of infringement by contribution" is petitioner's doing, not that of the Court below.

The "new theory of contributory performance" which petitioner attributes to the Court below, Pet. B. 52, is equally fanciful. Neither the manufacturers and distributors of television sets and television antennas, nor the common carriers or public utilities to which petitioner refers, Pet. B. 53, receive broadcasts of respondent's copyrighted motion pictures, amplify and otherwise process them electronically, and then relay and distribute them for profit to television sets in the homes and commercial establishments of 15,000, or so, paying customers. This is not to say, however, that those who knowingly aid and abet petitioner, without any legal obligation to do so because of their public

callings, may not be liable as contributory infringers under the "standard doctrine" to which petitioner refers. Pet. B. 40. So far as concerns "master antennas", Pet. B. 54, it may be noted that petitioner's operations did not involve any such apparatus, and that no such question was considered below, A 642, 903, 904, or is now before this Court. In any event a CATV system, is not "simply a master T.V. antenna", *Second Report and Order,* 2 FCC 2d 725, 780 (1966).

The Solicitor General agrees, U.S. Mem. 2, that

> With respect to the basic question considered below, * * * the court of appeals was correct in deciding that the activities of the CATV systems constitute a "public performance" within the meaning of Sections 1(c) and 1(d) of the Copyright Act (17 U.S.C. 1(c), 1(d)).

II

BY LICENSING BROADCASTS OF ITS COPYRIGHTED MOTION PICTURES, RESPONDENT DID NOT, AS A MATTER OF COPYRIGHT LAW, LOSE ITS EXCLUSIVE RIGHT UNDER SECTIONS 1(c) AND 1(d) TO PERFORM THEM PUBLICLY AND PETITIONER INFRINGED SUCH RIGHT BY RETRANSMITTING THE BROADCASTS OF THEM WITHOUT RESPONDENT'S CONSENT.

(a) *A "license implied in law" is a contradiction in terms.* Respondent agrees with the view of the Solicitor General, U.S. Mem. 5, 6, in effect, that a "license implied in law" is a contradiction in terms. While the phrase may be a handy tag to describe consequences, it is, in and of itself, conceptually barren and devoid of substance. What is actually involved in petitioner's claim, Pet. B. 72-79, to a "license implied in law under

the Copyright Act", is whether, as a matter of law, when a copyright owner licenses a television station to broadcast his copyrighted work, the copyright owner thereby loses so much of his exclusive right to perform it publicly, that petitioner and others may freely receive such broadcast, and publicly perform it for their own gain. Petitioner points to no provision of the Copyright Act, and to no guiding precedent to support its contention, and, indeed, there is none.[10] U.S. Mem. 7, 8.

(b) *Making exceptions to unqualified statutory rights is a legislative function.* As the Solicitor General makes plain, U.S. Mem. 5, 7, 8, petitioner's claim to a "license implied in law" under the Copyright Act depends not on a construction of any of the provisions of the Act, but, rather on an exercise of "judicial flexibility" to the end that an exception to the exclusive right of copyright owners under sections 1(c) and 1(d). of the Act "be established in law by this Court". In refusing to take such action in like circumstances in *Buck,* 283 U.S. at 199, this Court emphasized that "the existing statute makes no such exception", and that writing an "exception" into the Act was wholly a legislative function. Similarly, in *Jerome H. Remick & Co.* v. *American Automobile Accessories Co.,* 5 F. 2d 411,

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[10] The "implied" license, suggested in *Buck,* 283 U.S. at 199, fn. 5, as a "possibility" if the facts had been otherwise than they were in that case, was, clearly, a license implied in fact. *Society of European Stage Authors and Composers* v. *New York Hotel Statler Co.,* 19 F. Supp. 1, 6 (S.D.N.Y. 1937) *per* Woolsey, J. The qualified "compare" citation in *Buck, loc. cit. supra,* of *Buck* v. *Debaum,* 40 F. 2d 734 (S.D. Cal. 1929) would seem clearly to indicate something less, or other than acceptance. Petitioner's defense of "license implied in fact" is one of the issues which the District Court reserved for later trial and determination, and has yet to be tried. It was not before the Court below, and is not now before this Court. See pp. 3, 4, *supra.*

412 (6th Cir. 1925), cert. denied, 269 U.S. 556, the Court said:

> Bills have been introduced in both House and Senate to permit broadcasting without infringing copyrights. The rights of composer, producer, performer, and the public under this new method of reproduction are eminently matters for considered legislation; but, until Congress shall have specifically determined the relative rights of the parties, we can but decide whether and to what extent statutes covering the subject-matter generally, but enacted without anticipation of such radical changes in the method of reproduction, are, fairly construed, applicable to the new situation.

The cases applying the so-called "fair use" doctrine, suggested by the Solicitor General, U.S. Mem. 5, 8, as precedents for judicial "qualification"—i.e., whittling away—of the statutory rights of copyright owners, would appear, on analysis, as not involving "a development of the law along these lines". U.S. Mem. 16. Basically, what is involved in such cases is whether what was done, fairly considered, was to print, reprint, publish, copy or dramatize the copyright owner's work, etc., etc., within the meaning and purpose of section 1 of the Copyright Act, which reserves such rights exclusively to the copyright owner, or whether what was done amounted to something less, frequently to the point of *de minimis non curat lex*.[11]

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[11] See, e.g., *Dun* v. *Lumbermen's Credit Association*, 209 U.S. 20 (1908); *West Publishing Co.* v. *Edward Thompson Co.*, 176 Fed. 833, 838 (2d Cir. 1910); *Mathews Conveyer Co.* v. *Palmer-Bee Co.*, 135 F. 2d 73, 84, 85 (6th Cir. 1943); *Rosemont Enterprises, Inc.* v. *Random House, Inc.*, 366 F. 2d 303, 306, 307 (2d Cir. 1966), cert. denied 385 U.S. 1009; *Columbia Pictures Corp.* v. *National Broadcasting Co.*, 137 F. Supp. 348, 350, 351, 353, 354 (S.D. Cal. 1955); *Cravens* v. *Retail Credit Men's Ass'n.*, 26 F. 2d 833, 834, 835 (M.D. Tenn. 1924).

The Solicitor General also suggests, U.S. Mem. 8, that "the same judicial flexibility in construing the Copyright Act which admits of its application to new developments in technology should similarly obtain" to create new limitations on the statutory rights of copyright owners based upon "considerations of public policy". But, "judicial flexibility" plays no part in the process of determining whether the Copyright Act applies to "new developments in technology", as *White-Smith Music Publishing Co.* v. *Apollo Co.*, 209 U.S. 1 (1908); Pet. B. 29-33; U.S. Mem. 7; *supra*, pp. 16-18, demonstrates. In making such determinations, courts "but decide whether and to what extent statutes covering the subject matter generally, but enacted without anticipation of such radical changes * * * are, fairly construed, applicable to the new situation", and leave to the Congress the consideration of what the "rights of composer, producer, performer, and the public" in the new circumstance *should* be. *Jerome H. Remick & Co.*, 5 F. 2d at 411, 412; *supra*, p. 30.[12]

The Solicitor General's reliance, U.S. Mem. 8, on *Fox Film Corp.* v. *Doyal*, 286 U.S. 123 (1932) would appear to be misplaced. There, the question, which this Court answered in the negative, was whether copyright was such a federal instrumentality as to immunize copyright royalties from a state gross receipt tax. In describing the relationship of the United States to copyright, this Court referred to copyright's constitu-

[12] That the provisions of sections 1(c) and 1(d) of the Copyright Act securing to copyright owners the exclusive right publicly to perform their works apply to "new developments in technology" is made plain by the statutory language, "in any manner or by any method whatsoever", used in those sections.

tional basis and statutory origin, and then continued, 286 U.S. at 127, 128:

> In creating this right, the Congress did not reserve to the United States any interests in the production itself, or in the copyright, or in the profits that may be derived from its use. * * * The owner of the copyright, if he pleases, may refrain from vending or licensing and content himself with simply exercising the right to exclude others from using his property. * * * The sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of authors. A copyright, like a patent, is "at once the equivalent given by the public for benefits bestowed by the genius and meditations and skill of individuals and the incentive to further efforts for the same important objects".

The Court then emphasized, 286 U.S. at 130, that:

> Copyright is a right exercised by the owner during the term at his pleasure and exclusively for his own profit and forms the basis for extensive and profitable business enterprises. The advantage to the public is gained merely from the carrying out of the general policy in making such grants * * *.

While the Solicitor General suggests that this Court create a narrower exception, i.e., a "license implied in law" of more limited application, U.S. Mem. 9-16, than does petitioner, Pet. B. 72-79, neither petitioner nor the Solicitor General advances any sound or persuasive reason why this Court should carve *any* exception out of the exclusive performing rights expressly granted copyright owners, particularly in view of the overall revision of the Copyright Law which is cur-

rently pending in the Congress,[13] and to which the Solicitor General refers with particularity. U.S. Mem. 16, text and fn. 10.

(c) *That a copyright owner licenses another publicly to perform his work, does not "release" it to the public.* Petitioner's principal argument, Pet. B. 75-79, which the Solicitor General rejects, U.S. Mem. 9, is that in licensing television stations to broadcast its copyrighted motion pictures, respondent "released for reception by the public that broadcast", without limit, and "exhausted the monopoly so far as reception of that broadcast is concerned", so that "the public" has a "license implied in law to receive that broadcast off the air for private viewing by the use of equipment of its own choice—including reception aided by a CATV system such as petitioner's". This argument is based on two obvious fallacies.

First, petitioner misconceives the meaning of the terms "publicly" and "in public" in the context of §§ 1(c) and 1(d) of the Copyright Act. To license another to perform a copyrighted work "publicly", or "in public", is not to "release" it "to the public". It is rather, but to authorize the *licensee,* and no other,

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[13] H.R. 2512, 90th Cong., 1st Sess., which was passed by the House on April 11, 1967. See, 113 Cong. Rec. 43644-43647, April 6, 1967; id. 43857, April 11, 1967. S. 597, 90th Cong. 1st Sess., a companion bill to H.R. 2512 as originally introduced, is also pending. See, Memorandum of the United States—Motion to Postpone Oral Argument—filed herein December 12, 1967, pp. 3, 4. The so-called Kastenmeier Bill, section 111 of H.R. 2512, as brought to the floor of the House, U.S. Mem. 16, fn. 10, was deleted before H.R. 2512 was passed by the House. To say at this time, as the Solicitor General does, U.S. Mem. 16, fn. 10, that "legislation which eventuates may well follow" one "pattern" or another, is pure speculation.

to perform the work "in public", at the time and place, and in the manner specified in the license, and at no other time or place, or in any other manner. A 29, 30, 809-817; E 340-3. A license is merely a waiver, personal to the licensee, to the extent it provides, of the copyright owner's exclusive right to perform his work in public. Cf. *DeForest Radio Telephone & Telegraph Co.* v. *United States,* 273 U.S. 236, 242 (1927); *General Talking Pictures Corp.* v. *Western Electric Co.,* 304 U.S. 175, 181 (1938); *Goldsmith* v. *C.I.R.,* 143 F. 2d 466, 467 (2d Cir. 1944), per L. Hand, J., cert. denied 323 U.S. 774.

Secondly, since the copyright owner's exclusive right is *to perform* his work publicly, and *not to view it,* it is a concept wholly alien to copyright that by licensing another publicly to perform his work, or otherwise, the copyright owner licenses the public, by implication of law or of fact, or otherwise, to view it. The copyright owner has no viewing rights to license, and it would be no less meaningless a gesture for the law to imply that the public has a license to view the broadcast work, than it would be for the copyright owner expressly to grant one. For, the public needs no license of the copyright owner *to view* a performance of his copyrighted work.

Thus, contrary to petitioner's understanding, Pet. B. 77, the viewing public, including petitioner's customers, are not infringers, not because the public has a license implied in law giving it a right to view the broadcast, but, rather, because viewing, as distinguished from performing, does not require a license. Accordingly, it proves too much to argue, as petitioner does, Pet. B. 77, that the public's "right" to receive the authorized broadcast "must protect petitioner,

whose CATV service is chosen by members of the public as their preferred means of enjoying their right to receive". For, if there is any validity to petitioner's contention, anyone could publicly perform a copyrighted work for profit, on the air, live or otherwise, without the copyright owner's consent, and yet not be an infringer because the members of the public constituting his audience did not infringe. An audience does not infringe even in watching an infringing performance. Petitioner's logic leads inevitably to the destruction of copyright as a system and a concept. Cf. U.S. Mem. 9.

Petitioner patently misconceives the policy of the Copyright Act as being crudely and cynically to lure a copyright owner to "release" his work "to the public", and that once it has been so "released" for any purpose, howsoever limited, it is, in effect, to be considered as being in the public domain, free to be used for profit by anybody. Pet. B. 58-62, 73-75. Cf. U.S. Mem. 9. Certainly, that is not what this Court meant, as petitioner seems to think, when it said in *U.S.* v. *Paramount Pictures,* 334 U.S. 131, 158 (1948) that the "reward" to the copyright owner is "a secondary consideration". For, as this Court made plain in *Mazer* v. *Stein,* 347 U.S. 201, 219 (1954):

> The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that *encouragement of individual effort by personal gain is the best way to advance public welfare* through the talents of authors and inventors in "Science and useful Arts". Sacrificial days devoted to such creative activities deserve rewards commensurate with the services rendered. [Emphasis supplied]

Indeed, the policy behind the Copyright Act is " 'to afford greater encouragement to the production of literary works * * * ' ", *Washingtonian Pub. Co., Inc.* v. *Pearson,* 306 U.S. 30, 36 (1939), and, as this Court emphasized in *Fox,* 286 U.S. at 130, *supra,* p. , the "advantage to the public" of copyright "is gained merely from the carrying out of the general policy in making such grants * * *".

If the policy of the Copyright Act were as petitioner contends, copyright would be in large measure self-defeating. It is, of course, no part of the judicial function to assure "copyright owners the highest possible profits", but, on the other hand, the Copyright Act is to be applied, consistent with its purpose, "to provide an atmosphere in which authors have a strong incentive to create and disseminate their works and are given the opportunity to obtain fair remuneration for the use of them". U.S. Mem. 6. While the measure of profit and fair remuneration is a function of the market, the inviolable rights of copyright owners have been prescribed by the Congress in the Act. In construing copyright statutes, which is the judicial function, this Court, in *Bobbs-Merrill Co.* v. *Straus,* 210 U.S. 339, 346 (1908), cautioned that they

> * * * ought to be reasonably construed, with a view to effecting the purposes intended by Congress. They ought not to be unduly extended by judicial construction to include privileges not intended to be conferred, *nor so narrowly construed as to deprive those entitled to their benefit of the rights Congress intended to grant.* [Emphasis supplied.]

This Court has made it unmistakably plain that the Copyright Act grants to the copyright owner the "exclusive right" not merely to one public performance, or any limited number of public performances, but "expressly" to "all public performances for profit" of his work during the term of the copyright, without limitation. *Buck,* 283 U.S. at 197. This, then, and nothing less or different, is the measure of the performing rights Congress intended to grant to copyright owners. *Irving Berlin, Inc.* v. *Daigle,* 31 F. 2d 832, 885 (5th Cir. 1929). Nevertheless, what both petitioner and the Solicitor General propose is that, by one device or another, this Court deprive copyright owners of the benefit of the full measure of the performing "rights the Congress intended to grant." Petitioner's proposed "license implied in law" is, of course, nothing other than a legal fiction to cloak what the Solicitor General so frankly proposes, the bald judicial creation of an exception to the performing rights of copyright owners as expressly provided by the Act. U.S. Mem. 5-8.

(d) *There is no analogy in the cases dealing with sales of chattels.* Neither *Aro,* 377 U.S. 476 (1964), on which both petitioner and the Solicitor General rely, Pet. B. 74-76, text and fns. 91, 93; U.S. Mem. 6, fn. 3, nor *Bobbs-Merrill,* 210 U.S. 339 (1908), on which petitioner relies, Pet. B. 74, 77, but which the Solicitor General dismisses as *not* "pertinent here", U.S. Mem. 5, text and fn. 2, affords any precedent, direct or by analogy, for this Court's embarking on any such course. The "implied license to use" to which this Court refers in *Aro,* 377 U.S. at 484, citing *Adams* v. *Burke,* 17 Wall.

453, Pet. B. 74, is, clearly, a license implied in fact, and not a so-called "license" implied in law.[14]

Nor is *Bobbs-Merrill,* 210 U.S. 339, based on any theory of license implied in law. On the contrary, the Court's holding there that a copyright owner who sold copies of his work could not limit the price at which purchasers from his vendee could resell them, was grounded, explicitly, on a construction of that provision

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[14] A patentee's right is, expressly, "to exclude others from making, *using,* or selling the invention" during the term of the patent. Tit. 35 U.S.C. § 154. Conversely, Tit. 35 U.S.C. § 271(a) provides that "whoever without authority makes, *uses* or sells any patented invention * * * infringes the patent". [Emphasis supplied.] In this circumstance, the sale by a patentee of an article embodying the invention ordinarily will give rise to an inference of fact that he thereby intended to authorize the purchaser *to use it.* For, unless it affirmatively appears otherwise, the natural inference is that he understood when he sold it, that the purchaser's purpose in buying the article was to use it. *Green* v. *Electric Vacuum Cleaner Co.,* 132 F. 2d 312, 314 (6th Cir. 1942), cert. dismissed 319 U.S. 777. The purchaser's right to repair the article, U.S. Mem. 6, fn. 3, is but a facet of his right to use it, i.e., "to preserve" its "fitness for use". *Aro,* 377 U.S. at 497. But, reconstruction, as distinguished from repair, constitutes an infringement. See *Aro* 377 U.S. at 479, 490. It is not clear what the Solicitor General means by his reference, *loc. cit. supra,* to "improvement". A purchaser of an article embodying a patented invention, can, as an incident to his right to use it, make minor improvements in it going to its usability. *Wilbur-Ellis Company* v. *Kuther,* 377 U.S. 422 (1964). But, an improver is not, as such, licensed to use the improved invention, and needs the consent of the patentee to use the elements constituting the original invention. *Temco Electric Motor Co.* v. *Apco Mfg. Co.,* 275 U.S. 319 (1928). Moreover, the purchaser's right to resell the patented articles is not based on an implied license, as the Solicitor General suggests, *loc. cit. supra,* but on a construction of the patent law that a patentee's exclusive right to control the sale of articles embodying his invention, is exhausted with respect to any one of such articles, when he sells it. *Bauer & Cie.* v. *O'Donnell,* 229 U.S. 1 (1913).

of the copyright statute granting copyright owners the right to make and vend copies of their works. 210 U.S. at 346, 350-351; Cf. *Bauer & Cie.* v. *O'Donnell,* 229 U.S. 1 (1913). At the same time, the Court cautioned, significantly, that although a purchaser of a copy was free to resell it, "he could not publish a new edition of it", *Bobbs-Merrill,* 210 U.S. at 350, obviously, because the copyright owner had not granted the purchaser a license to publish his work.

In any event in *Buck,* 283 U.S. at 197, this Court expressly rejected the analogy to *Bobbs-Merrill* for which petitioner contends, and held that the unlicensed retransmission to any segment of the public of a public performance by broadcast, is itself a public performance, *supra,* pp. 25, 26, and, accordingly, infringes the copyright owner's exclusive right to perform his work. In so holding, this Court said, 283 U.S. at 197:

> The argument here urged * * * is that, since the transmitting of a musical composition by a commercial broadcasting station is a public performance for profit, control of the initial radio rendition exhausts the monopolies conferred, both that of making copies * * * and that of giving public performances for profit * * *; and that a monopoly of the reception for commercial purposes, of this same rendition, is not warranted by the act. The analogy is invoked of the rule under which an author who permits copies of his writings to be made cannot, by virtue of his copyright, prevent or restrict the transfer of such copies. Compare *Bobbs-Merrill Co.* v. *Straus,* 210 U.S. 339. This *analogy is inapplicable. It is true that control of the sale of copies is not permitted by the act,* * * *

but a monopoly is expressly granted for all public performances for profit. [Emphasis supplied][15]

(e) *Copyright owners may license others to exercise their exclusive rights at given places or within specified geographical areas.* No analogy or relevance is to be found in the principle on which petitioner relies, Pet. B. 74-77, fn. 91 at 75, fn. 95 at 77, that a patentee may not restrict the territory in which the vendee of a chattel embodying the invention may use or sell it. The principle rests squarely on a construction of the provisions of patent law granting patentees the exclusive right to vend or sell, and is not based on any theory of a "license" implied in law running to the purchaser. See, e.g., *U.S.* v. *General Electric Co.*, 272 U.S. 476, 489 (1926); *Keeler* v. *Standard Folding-Bed Co.*, 157 U.S. 659, 663 (1895); *Bauer & Cie.* v. *O'Donnell*, 229 U.S. 1, 16 (1913).

Here, however, there was no sale of any chattel as in the patent cases on which petitioner relies, or as was the case in *Bobbs-Merrill*, 210 U.S. 339, which espouses an identical principle under copyright law applicable to sales by copyright owners of chattels constituting copies of their works. Here the copyright owner *licensed* broadcasting stations publicly to per-

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[15] Petitioner's attempted explanation, Pet. B. 74, fn. 90, of the passage from *Buck* quoted above rests on a truncated quotation from elsewhere in that opinion, taken out of context. The point was not, as petitioner claims, that "the broadcast * * * had not been authorized by the copyright owner", as appears clearly from what the Court actually said, 283 U.S. at 198: that *"since the public reception for profit in itself constitutes an infringement*, we have no occasion to determine under what circumstances a broadcaster will be held to be a performer, or the effect upon others of his paying a license fee". [Emphasis supplied].

form his works, and as is pointed out, *Adams* v. *Burke*, 17 Wall. 453, on which petitioner heavily relies, the rule there announced with respect to chattels *purchased* from the patentee or his licensee, was adopted, 17 Wall. at 456, 457, notwithstanding "Whatever * * * may be the rule when patentees divide territorially their patents, as to the exclusive right to make or sell within a limited territory * * *".[16] As was said in *Bloomer* v. *McQuewan*, 14 How. 539, 549 (1853), "The distinction is a plain one". And there is no question but that a patentee may lawfully *license* his patent rights, or some of them, for "* * * a *specific part* of the United States". *U.S.* v. *General Electric Co.*, 272 U.S. at 489. Nor has it ever heretofore been suggested that by licensing a public performance of a copyrighted work in one place, e.g., Pittsburgh, the copyright owner loses his exclusive right to other public performances of the work *in the same place, or in other places,* e.g., Clarksburg, W. Va., Los Angeles, or New York. Indeed, in *Manners* v. *Morosco*, 252 U.S. 317, 325 (1920) this Court recognized that a license to perform a copyrighted work publicly "within * * * territorial limits", reserves to the copyright owner his exclusive right to perform it publicly elsewhere. See also, *Interstate Circuit, Inc.* v. *U.S.*, 306 U.S. 208, 227, 228 (1939).

The horror petitioner expresses, Pet. B. 83, at the thought that the Court below should permit copyright owners "to erect their own 'areas or zones'" must be feigned. Licenses publicly to perform copyrighted

[16] Indeed, in *Adams*, as well as in *Keeler*, on which petitioner also relies, the patentee had granted licenses to make and vend to different licensees for different geographical areas, and the question, in effect, was whether the vendee of one licensee could use the article in the territory of the other.

works have historically and traditionally been limited "territorially" to a particular theater, or group of theaters, or to a particular community or region, and such licenses have, of course, been judicially enforced.[17] Clearly, in licensing public performances of a copyright work, it is the copyright owner's right to specify that the performances licensed may be given only "within the territorial limits stated" in the license. *Manners* v. *Morosco*, 252 U.S. at 325. Cf. *Second Report and Order*, 2 FCC 2d 725, 778 (1966), where the Federal Communications Commission said:

> A television station normally obtains the right to exhibit non-network programs by outright payments to program suppliers, from whom the station usually secures the exclusive right to exhibit the programs within a particular geographical area

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[17] See, e.g., *Metro-Goldwyn-Mayer Distributing Corp.* v. *Bijou Theatre Co.*, 59 F. 2d 70 (1st Cir. 1932); *Tiffany Productions* v. *Dewing*, 50 F. 2d 911 (D. Md. 1931). Neither *Arnold Schwinn & Co.*, 388 U.S. 365 (1967) nor *Brulotte*, 379 U.S. 29 (1964), Pet. B. 27, 77, fn. 95, support petitioner. In *Schwinn* it was held, under the antitrust laws, that a manufacturer and purchasers from him could not lawfully limit the persons to whom, or the geographical areas in which the products sold could be resold. On the other hand, *Schwinn* held that the manufacturer could put such limitations on sales by consignees who acquired no title to the products. Thus, if *Schwinn* has any relevance here, it supports respondent, for a license is not a "sale", being "no more than 'a mere waiver of the right to sue' ". *General Talking Picture Corp.*, 304 U.S. at 181. The holding of *Brulotte* is that since the patentee's right is to exclude others from making, selling or using the invention during the term of the patent, he may not charge royalties for the use of an article incorporating the patented invention, after the term of the patent had expired. Here, the continuing validity of respondent's copyrights at the times when petitioner received broadcasts of them, and relayed and distributed them by cable to its 15,000, or so, paying customers, is not open to question, Pet. B. 5.

and for a particular length of time. This exclusivity reflects the judgment that presentation by others of a program such as a feature film within the station's market within some period of time obviously reduces the audience and the value of the program to the station. As we noted, the amount and kind of exclusivity that can be created is restricted by the antitrust laws. But those laws permit the creation of substantial exclusivity as a normal incident of the program distribution process * * *.

(f) *In publicly performing copyrighted works by relaying and distributing broadcasts of them, CATV is not doing what the public has a right to do.* The analogy of the patent cases is wholly inapplicable here because the patentee's exclusive right is to *make, use and sell* his invention. see fn. 14, *supra,* p. 38, while the copyright owner's exclusive right with which this case is concerned, is *publicly to perform* his work. Thus, in the patent cases, those who purchase articles embodying the invention from the patentee or under his authority, i.e., the public, are themselves licensed *to use* the invention by or under authority of the patentee. The copyright owner, however, licenses only theatrical producers, moving picture theatres, television stations, and the like, *publicly to perform* his work, and the public, is *not* licensed by the copyright owner, for the plain reason that the Copyright Act reserves to the copyright owner no rights with respect to watching or hearing a performance of his work.

Significant consequences flow from this difference. Thus, as in *Aro*, 377 U.S. 476, a third party does not infringe a patent if, without the consent of the patentee, he does for authorized users of the patent, i.e., the

public, what they themselves could do under their licenses to use. On the other hand, one who like petitioner, without the consent of the copyright owner, receives a broadcast of a copyrighted work, and relays it to members of the public who are its customers, is not, as petitioner claims, Pet. B. 77, doing for such members of the public what they are licensed to do for themselves. For the public certainly has no license publicly to perform the copyrighted work in the manner petitioner performs it, or any other. Thus, contrary to petitioner's views, Pet. B. 76, fn. 93, 77, the discussion in Part II of *Aro*, 377 U.S. at 493-500, does not support petitioner's contention here for a "license" implied in law.

(g) *One royalty for each public performance for profit of his work is the copyright owner's lawful due.* Petitioner strangely pleads, Pet. B. 76, fn. 93, for the application here of the principle so pithily stated by Mr. Justice Black in the first *Aro* case, 365 U.S. 336, 360: "One royalty to one patentee for one sale * * *". For that, precisely, is what respondent is contending for. Respondent does not deal in chattels, but, rather, in the right publicly to perform its works, and its "sales" are of licenses authorizing others so to perform them. Respondent licensed the broadcasting stations to perform its works, and received a royalty for each performance by broadcast. Petitioner also performed respondent's works publicly for profit, but claims that no recompense is owing respondent because respondent was paid by the broadcasting station, and that any payment by petitioner would be a "second license fee", Pet. B. 78. But each performance, like each sale, is entitled to one royalty, and petitioner's performance stands on its own feet as a public performance separate

and apart from the broadcast of the television station it receives and retransmits for profit to its customers. *Buck,* 283 U.S. at 197, 198; *Society of European Stage Authors and Composers* v. *New York Hotel Statler,* 19 F. Supp. 1-6 (S.D.N.Y. 1937), per Woolsey, J.[18] Thus, in *Buck,* 283 U.S. at 198, this Court said:

> * * * nothing in the act circumscribes the meaning to be attributed to the term "performance," or prevents a single rendition of a copyrighted selection from resulting in more than one public performance for profit. While this may not have been possible before the development of radio broadcasting, the novelty of the means used does not lessen the duty of the courts to give full protection to the monopoly of public performance for profit which Congress has secured to the composer. * * * *No reason is suggested why there may not be more than one liability.* [Emphasis supplied.]

(h) *A non-statutory exception to the statutory rights of copyright owners cannot be based on speculation as to possible future "anticompetitive consequences".* Petitioner contends, Pet. B. 62-67, that immunity from liability for infringement for operations such as its own, should be read into the Copyright Act because of "anticompetitive consequences" that might other-

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[18] Petitioner suggests, Pet. B. 78, text and fn. 97, that if it has to pay a fee to respondent, it will pass it on to its customers, who have already "shared in the payment of the first fee, since the public pays for television programs indirectly by buying the products and services of advertisers". But, while advertising costs of all kinds are an element of the price of a product, such costs are borne not by television viewers, or magazine readers, as such, for example, but by the whole generality of consumers, whether or not they are reached by any particular advertising media or none. Accordingly, it is highly speculative whether, and, if so, to what extent petitioner's customers have "shared in the payment" of the fee paid by the broadcasting station.

wise result. See also, U.S. Mem. 7, fn. 4. But petitioner's reliance on the *ex parte* statement, Pet. B. 63, 64, before a Senate subcommittee of a Department of Justice officer is misplaced. Mr. Zimmerman, who normally serves as "first assistant" in the Department's Antitrust Division, was not speaking to the Copyright Act, but was, rather, addressing himself to a Copyright Law Revision Bill [19] which recognized CATV liability for copyright infringement, and was urging that the Bill be amended expressly to exempt CATV from all, or practically all, such liability.[20] Given his way, the Congress would legislate out of existence, at least so far as concerns CATV, the "monopoly * * * expressly granted of all public performances for profit". *Buck,* 283 U.S. at 197. While the considerations put forward by Mr. Zimmerman may possibly be matters into the merits of which the Congress may wish to look in deliberating proposed legislation, they are utterly irrelevant to the application of existing law. See, *Jerome H. Remick,* 5 F. 2d at 411, 412, quoted *supra,* p. .

That, like all other rights, copyright may be subject to abuse or misuse, is no ground for applying the Copyright Act "so narrowly * * * as to deprive those entitled to their benefit of the rights Congress intended

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[19] S. 1006, 89th Cong., 1st Sess., 1965.

[20] Mr. Zimmerman's statement appears in full in *Copyright Law Revision—CATV,* Hearings on S. 1006, Subcommittee on Patents, Trademarks and Copyrights, Senate Committee on the Judiciary, 89th Cong., 2d Sess., August 2, 3, 4, and 25, 1966, at pp. 211-219. Mr. Zimmerman's basic misconceptions concerning the nature of copyright, and of CATV and television operations, are succinctly pointed out in the statement of Herman Finkelstein, general counsel of the American Society of Composers, Authors and Publishers, *ibid.*, pp. 230 *et seq.*

to grant". *Bobbs-Merrill,* 210 U.S. at 346. For, there are ready means of dealing with such misuse or abuse if, and when they occur or are threatened, and the mere possibility that an innocent right may be abused or misused, is no ground to curtail or destroy it, by construing it away, or otherwise. Thus, the Congress has endowed the antitrust laws with a variety of sanctions, and a whole arsenal of means of enforcement, fully adequate to prevent violations when they are threatened, and to redress them, and punish violators, when they occur. The law is sufficiently versatile to deal adequately with anticompetitive acts threatened or effected through the instrumentality of copyright. See e.g., *U.S.* v. *Loew's, Incorporated,* 371 U.S. 38 (1962); *U.S.* v. *Paramount Pictures,* 334 U.S. 131 (1948); *Interstate Circuit, Inc.* v. *U.S.,* 306 U.S. 208 (1939); *Alfred Bell & Co.* v. *Catalda Fine Arts, Inc.,* 191 F. 2d 99, 105, 106 (2d Cir. 1951); *Second Report and Order,* 2 FCC 2d at 778. There is no need, nor would it be appropriate to sacrifice any of the good that copyright protection does, to prevent the evils of wholly conjectural restraints of trade. Cf. U.S. Mem. 9. *Morton Salt Co.,* 314 U.S. 488 (1942), Pet. B. 67. but illustrates the application of such sanctions in the case of the misuse of a patent. *Sears, Roebuck & Co.,* 376 U.S. 225 (1964), *ibid.,* is utterly irrelevant holding that "unfair competition" protection, tantamount to that accorded a patented invention or a copyrighted work, cannot be extended to a design not entitled to protection under either the patent or copyright laws.

While the question of damages is an issue which the District Court has reserved for later trial and determination, A 174; Pet. B., fn. 4, and, accordingly, is not involved on this review, some reference to it may never-

theless be appropriate in view of the suggestion that if the decision of the Court below is permitted to stand, huge amounts of damages for infringement would be assessable against petitioner and others similarly engaged in retransmitting for profit broadcasts of copyrighted works without the consent of the copyright owners.[21]

Wholly apart from anything else, there may be considerable doubt whether the method used in calculating the possible damages does not exaggerate them many fold.[22] Even then, the possible consequences of infringement could, and should have been taken into account by petitioner and others who commercially retransmit broadcasts of copyrighted works, when they first embarked, and then continued on their course despite the notice implicit in the commencement of this action in June 1960. Nevertheless, copyright owners such as respondent are engaged in the business of exploiting their copyrights, not suppressing them. Accordingly, they look upon petitioner's industry as, potentially, a very substantial customer for their programs, and are very much aware that it would hardly be in their best interests to endanger this source of business, whatever their rights, *strictissimi juris,* may

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[21] See brief herein of National Cable Television Association, Inc., *amicus curiae,* 20, text and fn. 36; Pet. B. 4, 5.

[22] See, e.g., *F.W. Woolworth Co.* v. *Contemporary Arts, Inc.,* 344 U.S. 228 (1952); *Sheldon* v. *Metro-Goldwyn Pictures Corp.,* 309 U.S. 390 (1940); *Davilla* v. *Brunswick-Balke Collender Co. of New York,* 94 F. 2d 567, 569, 570 (2d Cir. 1938); *Washingtonian Pub. Co., Inc.* v. *Pearson,* 140 F. 2d 465 (D.C. Cir. 1944); *Shapiro, Bernstein & Co.* v. *4636 S. Vermont Ave., Inc.,* 367 F. 2d 236, 240 (9th Cir. 1966) modifying in other respects, *Shapiro, Bernstein & Co.* v. *Bleeker,* 224 F. Supp. 595 (S.D. Cal. 1963), and 243 F. Supp. 999 (S.D. Cal. 1965); *Woodman* v. *Lydiard-Peterson Co.* 192 F. Supp. 67, 71 (D. Minn. 1912); *Davis* v. *E. I. DuPont de Nemours & Company,* 249 F. Supp. 329 (S.D.N.Y. 1966).

be. This is evidenced, if by nothing else, by their voluntary agreement, now in effect, not to sue commercial retransmitters of broadcasts of copyrighted works for infringement, so long as current mutual efforts to reach contractual arrangements, and to resolve differences over proposed amendments to the Copyright Law Revision Bill, continue.[23]

In any event, in view of the three-year statute of limitations, Copyright Act, § 115(b), petitioner's and its industry's potential liability for their intransigence is substantially less than it would have been, had copyright owners not been more disposed to arriving at contractual arrangements than to litigate. For, in addition to this action, so far as respondent has been able to ascertain, only one action has been commenced against a commercial retransmitter for copyright infringement.[24] The fears for petitioner's industry, if the decision below stands, are groundless.

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[23] See, Extension of Duration of Copyright Protection in Certain Cases, 113 Cong. Rec. S14067, October 3, 1967, remarks of Hon. John L. McClellan.

[24] *Columbia Broadcasting System* v. *Teleprompter Corporation*, Civil Action No. 64-3814, U.S. District Court for the Southern District of New York. This action is still pending. In this connection it should be noted that the quotation from the CBS Press Release of December 11, 1964, Pet. B., fn. 78, at 64, is taken out of context, and so abbreviated as to be misleading. The complete passage in the press release is:

> Finally, should CATV retransmission of network programming force stations off the air in some communities, the present system of nationwide program distribution by the television networks through their affiliated stations could break down; the quality of television service in this country could be impaired; and the availability of such service would be diminished. Network programs could become unavailable to persons in sparsely settled and rural areas not reached by CATV and some communities could lose their local programming service.

The difficulties which petitioner purports to foresee, Pet. B. 65, 66, in the negotiation of licenses, etc., are palpable bogeys, for copyright owners are in the business of exploiting their works and subsist by licensing others to perform them publicly; and it cannot reasonably be assumed that with prospective royalties as their incentive, copyright owners would permit any such difficulties, if they should arise, to go unresolved. That they may be unresolved up to now, is directly attributable to the adamant and concerted refusal of CATV operators to recognize copyright, and the consequent futility of undertaking unilaterally to resolve hypothetical problems, academically and *in vacuo*. Certainly, in any event, the prospective "difficulties" petitioner divines are not of such a character as to impel the adoption of any such concept as the license implied in law for which petitioner contends. Cf. U.S. Mem. 9, 17.

There is no basis for holding, as petitioner contends, that by licensing its copyrighted works for broadcast, respondent loses its exclusive right publicly to perform them to such extent that petitioner and others are free to pick up the broadcasts, and, without respondent's consent, to retransmit them for profit to members of the public anywhere. With respect to this contention, the Solicitor General has concluded, U.S. Mem. 9:

> Implication of a license in all circumstances would be tantamount to holding that once a copyrighted work was licensed to anyone it was irrevocably and entirely committed to the public domain. There seems to be no basis for such an implication, and it would be inconsistent not only with the terms of the statute but also with existing precedents and with sound policy. In addition, it would be

inconsistent with sound regulation of the nation's television resources, as expressed in the channel-allocation plan devised by the Federal Communications Commission pursuant to the specific congressional mandate to maximize television service through the extensive use of local stations.[6]

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[6] See the F.C.C.'s Sixth Report and Order, 17 Fed. Reg. 3905. Reference should also be made to the congressional policy favoring the development of UHF stations which, the Commission noted in its Second Report and Order, 31 Fed. Reg. 4540, were likely to suffer significantly from the unrestrained growth of CATV in metropolitan areas. In large part this difficulty stemmed, in the Commission's view, from the fact that CATV systems, unlike broadcasters, have not paid for programming which they provide, resulting in a situation of unfair competition between CATVs and independent and UHF stations.[25]

In principle, however, there can be no difference between the broad exception, by way of an implied license in law, or otherwise, for which petitioner contends, and the narrower exception which the Solicitor General proposes.

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[25] Consideration of the Communications Act and regulation of the Federal Communications Commission thereunder is reserved for point III, p. 52, *infra*.

III

NEITHER THE COMMUNICATIONS ACT NOR ANY POLICY THEREOF OR THEREUNDER HAS BY IMPLICATION REPEALED OR AMENDED OR OTHERWISE CREATED AN EXCEPTION TO SO MUCH OF SECTIONS 1(c) AND 1(d) OF THE COPYRIGHT ACT AS GRANT TO THE OWNER OF THE COPYRIGHT IN A MOTION PICTURE THE EXCLUSIVE RIGHT TO PERFORM IT PUBLICLY, THAT WHEN THE COPYRIGHT OWNER HAS LICENSED ITS BROADCAST BY A TELEVISION STATION, PETITIONER MAY, WITHOUT THE COPYRIGHT OWNER'S CONSENT, PERFORM IT PUBLICLY BY RETRANSMITTING THE BROADCAST WITHIN THE THEORETICALLY PREDICTED BOUNDARY OF THE WIDEST SERVICE AREA OF SUCH TELEVISION STATION—ITS SO-CALLED GRADE B CONTOUR—OR ELSEWHERE.

(a) *The Solicitor General's proposal, and petitioner's contention.* Under sections 1(c) and 1(d) of the Copyright Act, a copyright owner is "expressly granted" exclusive rights to "all public performances for profit" of his work. *Buck*, 283 U.S. at 197. Yet, the Solicitor General proposes, U.S. Mem. 9-16, and petitioner urges, Pet. B. 94-100, as an alternative to his broader contention, that when a copyright owner licenses a television station to broadcast his work, he loses his exclusive right to *all* public performances of it to the extent that others may, without his consent, publicly perform it for profit by receiving the broadcast and relaying and distributing it to members of the public, providing such retransmission is limited to the area within the broadcast station's Grade B contour—its widest theoretically predicted service area calculated under regulations of the Federal Communications Commission.

Petitioner's contention, Pet. B. 94-100, is that this derives from some impact on the Copyright Act of the

Communications Act, or its "policies", the effect of which is to create an exception, at least to the extent indicated, to the exclusive right of copyright owners. The Solicitor General, on the other hand, looks to the exercise of "judicial flexibility" to create such an exception, to the extent indicated, but no broader, in order to achieve "a substantial coalescence of communications and copyright policy with regard to CATV". U.S. Mem. 5, 8, 16. But, "copyright policy with regard to CATV" is no different than copyright policy with respect to any other manner or method of performing copyright works publicly for profit, for the Copyright Act expressly reserves to copyright owners the exclusive right "to perform" their copyrighted works "in public for profit * * * in any manner or by any method whatsoever". Thus, what the Solicitor General is, in fact, proposing is a "compromise", without precedent or warrant in law, which would sacrifice the plain right of copyright owners to "communications policy".

(b) *The "communications policy with regard to CATV" is expressly subordinate to, and wholly consistent with copyright.* The only "communications * * * policy with regard to CATV" is to lessen CATV's competitive advantage over broadcasters, which arises because broadcasters pay for their programs, while CATV neither pays for its programs nor honors the exclusive rights of broadcasters to programs under their licenses from copyright owners. This policy reflects the Federal Communications Commission's concern with the adverse consequences for television broadcast service of the adamant insistence of entepreneurs like petitioner that copyright owners have no rights which they are bound to respect. The

Commission has made it clarion clear that it found it necessary in the public interest to adopt its "carriage requirement"—the very rule on which petitioner would rely for immunity from copyright—and its related "non-duplication" and "distant signal" rules, "to ameliorate the risk that the burgeoning CATV industry would have a future adverse impact on television broadcast service, both existing and potential". *Second Report and Order,* 2 FCC 2d 725, 736 (1966). That risk the Commission found in the unfair competition between CATV and broadcasting, in that broadcasters pay for their programs, while "CATV carries them without paying anyone * * *" for them. *First Report and Order,* 38 FCC 683, 703-706 (1965); *Second Report and Order,* 2 FCC 2d at 778-781. Underlying this anomaly, and "central" to the Commission's "evaluation of the nature and effects of competition between CATV and television broadcasting" is "the present inability of program suppliers to control the availability of their programs via CATV", due to the refusal of CATV to recognize copyright. *First Report and Order,* 38 FCC at 740; fn. 32 at 704; See also, *Second Report and Order,* 2 FCC 2d at 768. The Commission observed, 38 FCC at 702 that:

> "When a cable [i.e., CATV] system brings to a [broadcasting] station's market additional signals which would not be readily available in the system's absence, it introduces competition for audience attention—and audience attention is the basic commodity that a station sells to advertisers.

Furthermore, the Commission observed, 38 FCC at 702, 703, the "competition between CATV systems and [broadcasting] stations" is marked by a feature "not

present in the ordinary competition between broadcasting stations":

> * * * the system—while carrying the signals of distant stations—may not carry the signals of a local station which the subscriber is otherwise able to receive. Upon installation of the cable, the CATV operator may not provide the subscriber with a switch enabling him to choose between off-the-air reception and cable reception. * * * A gain of a subscriber to the system will in most cases mean the effective loss of a potential viewer for the local station.

In short, the Commission found, 38 FCC at 704, 705, and reaffirmed in *Second Report and Order,* 2 FCC 2d at 778-781, that:

> The * * * situation is in many ways an anomalous one. From the point of view of an existing station, the CATV may—in providing its subscribers with the signals of distant stations—duplicate programs for which the station has bid and obtained exclusive exhibition rights. No other station in the same market could normally obtain access to those programs without effectively outbidding the local station in the program market. * * * CATV, however, carries them without paying anyone or engaging in any bidding process. From the point of view of an entrepreneur considering the establishment of another station in the same market, the situation is even more anomalous. Over and above his inability to obtain program exclusivity as against the CATV system, the very programs which he cannot obtain from program suppliers (because the existing station has been given exclusive exhibition rights in those programs) are made available in the market by the CATV without any payment or bidding process.
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> * * *

> In light of the unequal footing on which broadcasters and CATV systems now stand with respect to the market for program product, we cannot regard a CATV system's duplication of local programming via the signals of distant stations as a fair method of competition.

This "competition", the Commission noted, 38 FCC at 700, 701

> * * * is not between basically similar entities, which offer similar benefits to the public. On the contrary, if CATV operations should drive out television broadcasting service, the public as a whole would lose far more—in free service, in service to outlying areas, and in local service with local control and selection of programs—than it would gain.
>
> * * * In dealing with competition between broadcasters * * * "* * * The public interest is not disturbed if A is destroyed by B, so long as B renders the required service." * * * But if CATV competition should destroy a broadcasting operation, the CATV would not thereafter "render the required service".

The Commission took note of the case here at bar, 38 FCC at 704, fn. 32, and said:

> We neither intimate nor express any view as to the merit of these suits, which fall beyond our jurisdiction. We cannot close our eyes, however, to the significance which the present inability of program suppliers to control the availability of their programs via CATV has for competition between CATV and broadcasting stations.

The Commission struck at the very root of the matter when it said, 38 FCC at 706:

> We believe that a service such as CATV, which lives on the product of the existing television system and finds its justification as a supplementary

> service, should at a minimum give some measure of recognition to the fundamental distribution practices that have developed in the parent industry's competitive program market—to exhibition rights for which others must bargain and pay but which it has thus far been able to use without any bargaining by itself or by the stations whose signals it carries.

In sum, it is clear that the root of the evil that threatened the public interest objective of the Federal Communications Act to encourage "a multiplicity of local station outlets", *First Report and Order,* 38 FCC at 700, and to frustrate its achievement sufficiently to impel the Federal Communications Commission to adopt its "carriage requirement" and its related "nonduplication" and "distant signal" rules, was the adamant refusal, which still persists, of CATV operators, including petitioner, to recognize copyright. See, *passim First Report and Order,* 38 FCC 683-746 (1965). *Second Report and Order,* 2 FCC 2d, 725-808 (1966).

Patently, "communications policy" with regard to CATV, as manifested by the regulations promulgated by the Federal Communications Commission—and there is no other—is grounded on no communications need, and has no purpose other than to remedy the unhealthy consequences of the inability, up to now, of copyright owners to enforce copyright policy with regard to CATV. As the Federal Communications Commission has made clear, the "communications policy with regard to CATV" which it has announced is wholly subordinate to copyright policy. Thus, in reaffirming, and extending the applicability of its "carriage requirement" the Commission said, *Second Report and Order,* 2 FCC 2d 725, 768, 769 (1966):

> * * * our decision is not intended to affect in any way the pending copyright suits, involving as they

> do matters entirely beyond our jurisdiction. We have simply taken into account the existing practices of CATV systems and the present inability of program suppliers to control the availability of their programs via CATV. * * * the fact that we have given the local station the right to have its signal carried over the CATV system * * * affords no defense to that system in a copyright suit. The station cannot bestow broadcast or transmission rights to programming which it does not own (or as to which it has not obtained a license to do so). * * * In short, if the copyright suits are decided adverse to the CATV industry, we may * * * have to revise our rules.

The Commission has, indeed, gone so far to leave no room for doubt that its "carriage requirement" is subordinate to copyright as to caution television stations "to take into account the effect of any copyright decision in making requests for carriage under the present rules". *Second Report and Order,* 2 FCC 2d 725, 769, fn. 51a. And when CATV systems argued the converse to the argument made here, i.e., that its "carriage requirement" should be rescinded because of the decision of the District Court in this very case, the Commission replied, *Memorandum Opinion and Order,* 6 FCC 2d 309, 314 (1967):

> Finally, * * * we shall refer only briefly to copyright argument that has been advanced that in light of the district court's decision in the *United Artists* case * * * systems should not be required to carry local signals unless afforded complete copyright immunity by the stations requesting carriage. As stated * * * our rules are based on the present situation in which the CATV system operates without regard to copyright clearance. * * * As to the above argument, the short answer

> is that it is up to the system to determine whether to follow the district court's decision or the present industry practice, but it cannot properly obtain a waiver of our carriage rules when it follows a selective policy in this respect (i.e., ignoring copyright in the case of distant signals and purporting to follow it as to local signals). We believe that in light of present industry practice, no revision of our rules is needed, and that we should, therefore, deal with any situations of this sort by waiver, when and if they arise. * * *

Accordingly, it is *not* true to say, as petitioner does, Pet. B. 71, that "the decision below would make the system liable for copyright infringement if it obeys the regulation and performs such carriage". And, more importantly, there is clearly no divergence between "communications and copyright policy with regard to CATV" that calls for any "coalescence", as the Solicitor General claims. U.S. Mem. 16. The Solicitor General and petitioner would have this Court give primacy over copyright policy, made plain by the Congress in the Copyright Act, to a communications policy, avowedly subordinate to it, which the Federal Communications Commission adopted solely to alleviate the evils resulting from the nonenforcement of the very rights of copyright owners that the decision of the Court below would enforce.

(c) *The economic realities demonstrate that CATV carriage of broadcasts of a television station within its Grade B contour will have a substantial adverse effect on copyright owners.* While rejecting petitioner's contention for a broad "license" implied in law which would permit it and others engaged in the same business, without the copyright owner's consent, publicly

to perform his copyrighted works by receiving broadcasts of them, and relaying and distributing them anywhere, as being "inconsistent * * * with the terms of the statute * * * existing precedents * * * sound policy [and] sound regulation of the nation's television resources * * *", U.S. Mem. 9, the Solicitor General invokes, U.S. Mem. 6, 7, in support of its no less topsy-turvy position, the same irrelevant specter of conjectural anticompetitive or monopolistic consequences dealt with above, pp. 45-50, *supra,* as petitioner, and then opines that the "economic realities of the broadcasting industry suggest the appropriateness of implying a more limited license for CATV activities". U.S. Mem. 9, 10. And, petitioner, too, appeals to such "economic realities", in support of this, its alternative or secondary contention for a more limited "license" implied in law. Pet. B. 90-94. But what are here involved are not the "economic realities", so-called, of the television industry, but the exclusive right of copyright owners publicly to perform their works for profit, expressly reserved to them by the Copyright Act. It is a strange, and a dangerous doctrine that preaches that an act of Congress may be held to be in part repealed or modified, wholly without reference to any Congressional intention or action in that regard. See *Southern Pacific Co.* v. *Jensen,* 244 U.S. 205, 223. (1917), dissent of Mr. Justice Holmes; *Commissioner* v. *Beck's Estate,* 129 F. 2d 243, 245, 246 (2d Cir. 1942). In principle, the Solicitor General's proposal—petitioner's alternative—does not differ from petitioner's primary contention. They differ only in the *extent* to which the Copyright Act would be rewritten wholly without the mandate or the sanction of the Congress.

Even assuming, *arguendo,* that this might be done on the basis of "the economic realities of the broad-

casting industry", the record here is barren of any evidence as to what those "realities" are. Some of the Solicitor General's *a priori* assumptions in this regard, U.S. Mem. 10, 11, would appear to be non-controversial. Others, however, would seem to be ambiguous, speculative or contrary to respondent's experience or understanding. Moreover, although in rejecting petitioner's contention for a "license" implied in law the Court below "assumed" the "accuracy" of certain evidence offered by petitioner with respect to such matters, but not admitted by the District Court, A 1313-1327, 1360, 1361; Pet. B. 15, 16, 92, 93, the fact remains that such evidence is not included in the record, and that because it was not admitted, its truth has not been subjected to any of the prophylactic procedures of adversary litigation. In assuming its accuracy, while at the same time rejecting the contention it was intended to support, the Court below necessarily concurred in the District Court's conclusion that the proffered evidence was irrelevant. There has been no showing, moreover, that it would have established as fact any of the allegations it was intended to prove, and while "assuming" for the purpose indicated, that it would have, the Court below observed, significantly, that "at least" in certain respects, that seemed "debatable". A 1360, 1361.

The Solicitor General relies on so-called "economic realities" which, he says, indicate that the limited exception he proposes will bring about a situation in which "it might be expected that copyright owners can obtain greater royalties for the performance of their works", U.S. Mem. 10, and yet, he concludes, curiously, that the proposed limited exception "cannot be expected to have a substantial adverse impact on the incentive to create". U.S. Mem. 11. Whatever the

Solicitor General may mean, the error of his premises is clear.

First, the royalty for a license to broadcast a copyrighted motion picture is *not* calculated on the basis of the size of the television station's audience, or the amount of its advertising revenues. The licensing of films to television stations is a highly competitive business, and royalties are determined by the supply of, and demand for films of like quality in the market where the licensee broadcasts. Of course, more affluent stations in the more populous areas can, and may pay more for a license than less affluent stations in the less populous areas.

Secondly, CATV carriage of a "local" station's broadcasts, will not increase the station's audience in its *actual* service area, where it will merely tend to lessen the fragmentation of the station's audience by CATV's introduction into the area of broadcasts which could not otherwise be received there. Obviously, CATV's paying patrons become such not to get the "local" station which they can get off the air, but to get other stations whose broadcasts are not available to them off the air.

Thirdly, if CATV carries broadcasts of a television station to places within the station's Grade B contour, but where such broadcasts cannot be received off the air, CATV does, of course, increase the station's audience. But, the increase may be relatively so small in relation to the station's basic audience as to have no impact on its advertising revenues. Thus, here, CATV carriage of the Pittsburgh stations within whose Grade B contour any part of the Clarksburg-Fairmont area lies, increased by 15,000, or so, at most, the more than a million homes those stations reach without CATV

retransmission. On the other hand, the 15,000, or so, homes which petitioner reaches, comprise over 70 percent of the occupied dwellings in the Clarksburg-Fairmont area. Obviously, the effect of bringing the Pittsburgh broadcasts into the Clarksburg-Fairmont area, has a substantial adverse effect on the two local stations operating there, whose broadcasts can be received off the air. The situation is, in fact, no different than if those parts of the Clarksburg-Fairmont area were outside, rather than within the Grade B contour of the Pittsburgh stations. The consequence for copyright owners is similarly adverse because the market value of a film for broadcasting in any area is lessened when the film has already been shown by broadcast or CATV in the area. Thus, films licensed to Pittsburgh stations, and brought into the Clarksburg-Fairmont area by CATV, will for that reason bring less in royalties from the Clarksburg and Weston stations if, indeed, they will want them at all.

Fourthly, there is no reason to believe that CATV may not delete the advertising from the broadcasts it retransmits, and itself sell advertising. There has been some trend in this direction, and developments along these lines may be expected to accelerate in the future. CATV is not in business to make money for broadcasting stations, and if there are advertising revenues which can be gotten on the basis of CATV's audiences, CATV will see to it that it, and not the broadcasting stations get that revenue.

Finally, CATV can, and some systems do originate some of their own programs. In that connection, they are licensees of copyright owners, and pay royalties as any other licensees. To the extent, however, that CATV may be permitted to take broadcasts of copy-

righted works off the air and retransmit them without the copyright owners' consent, CATV's incentive to originate is lessened, and a market for copyrighted works which should be growing, is stultified.

Quite clearly, the "economic realities" point unmistakably to the Solicitor General's proposal, and petitioner's alternative contention, as being "appropriate" only in some never-never land, in the world of make-believe. If adopted, copyright owners can reasonably be expected to suffer serious adverse consequences.

(d) *The Communications Act and the Copyright Act deal with wholly different subjects on different planes. They are not in pari materia, and the Communications Act neither expressly nor impliedly repeals or amends any provision of the Copyright Act, and the Congress did not intend it to do so.* The Communications Act has no such impact on the Copyright Act as to create the exception to the exclusive right of copyright owners "to all public performances for profit" of their works, *Buck,* 283 U.S. at 197, which the Solicitor General suggests, and petitioner urges. The Copyright Act defines and delimits the rights of copyright owners in respect of their copyrighted works, and functions to establish a framework for the exploitation of copyrighted works in "an atmosphere in which authors have a strong incentive to create and disseminate their works". U.S. Mem. 6. Copyright "is a right exercised by the owner * * * at his pleasure and exclusively for his own profit * * *". *Fox Film Corp.* v. *Doyal,* 286 U.S. 123, 130 (1932), U.S. Mem. 8. The Communications Act, on the other hand, establishes a system for governing "interstate and foreign communications by

wire or radio, and all interstate and foreign transmission of energy by radio * * * and * * * all persons engaged * * * in such communication or such transmission * * * and * * * the licensing and regulating of all radio stations * * *". Communications Act § 2, Tit. 47 U.S.C. § 152, *infra*, p. 2 a. Clearly, the two statutes deal with entirely different subjects on entirely different planes. They are, on the face of it, neither consistent nor inconsistent with each other; they are entirely nontangential.

The Copyright Act and the Federal Communications Act are, thus, clearly not in *pari materia*,[26] and neither the Solicitor General nor petitioner points, or can point to any provision of the Communications Act which expressly repeals or amends sections 1(c) and 1(d) of the Copyright Act in any respect, or to anything in the legislative history of the Communications Act, or elsewhere, indicating that the Congress had any purpose or intention that it do so. Plainly, then, if the result proposed by the Solicitor General, and contended for by petitioner, is achievable, it can only be because the Communications Act has by implication repealed so much of sections 1(c) and 1(d) of the Copyright Act as to create an exception for public performances by CATV. But "repeals by implication are not favored", *U.S.* v. *Jackson*, 302 U.S. 628, 631 (1938), and a repeal or modification of a statute by a later statute will not be implied unless the two are in irreconcilable conflict, *Red Rock* v. *Henry*, 106 U.S. 596 (1883), or the later statute "necessarily destroys" the earlier one, *Wilmot* v. *Mudge*, 103 U.S. 217, 221 (1881),

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[26] Accordingly, *Allen Bradley Co.*, 325 U.S. 797 (1945); *Hutcheson*, 312 U.S. 219 (1941) and *Pan American*, 371 U.S. 296 (1963), Pet. B. 68, are inapplicable here.

or there is "positive repugnancy" between the two. *Wood* v. *U.S.*, 41 U.S. 342, 362-63 (1842). See also, *Posadas* v. *National City Bank*, 296 U.S. 497, 503, 504 (1936); *General Motors Acceptance Corp.* v. *U.S.*, 286 U.S. 49, 61, 62 (1932). The Communications Act patently has no such impact on the Copyright Act.

Persons engaged in communication subject to the Communications Act, and copyright owners cross paths only when the former communicate, or wish to communicate works of the latter "by wire or radio". Obviously, in effecting the effusion of communications of copyrighted works, or other pictures or sounds, persons engaged in "wire or radio" communication subject to the Act, are governed by it. Equally obviously, however, as the Federal Communications Commission has made plain, whether and under what circumstances persons so engaged have, or may acquire the right to communicate copyrighted works, is governed not by the Communications Act, but by the Copyright Act, which alone is the measure of rights pertaining to such works. *Report on Amendment of Rebroadcasting Rules,* 1 (part 3), Pike and Fischer R.R. 91:1131, 1134, 1139 (1952).

Under the Copyright Act, copyright owners have the exclusive right to perform their works publicly for profit, in any manner or by any method whatsoever. Nothing in either the Communications Act, or the Copyright Act expressly or impliedly impinges on that right, and no regulation of the Federal Communications Commission, as the Commission itself has expressly recognized, can serve as a substitute for the copyright owner's consent that his work be performed by another in public and for profit. *Second Report and Order,* 2 FCC 2d 725, 768, 769 (1966); pp. 57, 58, *supra.*

(e). *The "right" to receive broadcasts, if there is such a "right", does not import any right to retransmit broadcasts of copyrighted works to the public for profit, without the copyright owner's consent.* Petitioner argues, Pet. B. 79-84, that the Communications Act gives "the public" the "right" to receive television broadcasts, and that petitioner's retransmissions of broadcasts of copyrighted works to its paying customers, members of the public, is encompassed by such "right".

However, the obligation of a licensed television station, specifically, to "render such broadcasting service as will serve public interest, convenience or necessity", E 393, 396, 399, 404, 408, is a condition of its license, and while it clearly confers a right on the public collectively, as personified by the United States, it would not seem to give any right to individual members of the public, with whom the station has no contractual arrangements. Even if under the Communications Act, individual members of the public have a "right" to receive broadcasts, that "right" would not, necessarily or otherwise, import the right, in any individual member of the public to retransmit a broadcast of a copyrighted work for profit, to other members of the public, after receiving it, as petitioner does.

Petitioner's argument proves too much. If the public has the "right" which petitioner claims, and the Solicitor General seems to assume, then there is no reason why, subject to the provisions of section 325(a) of the Communications Act, a broadcasting station, such as WBOY in Clarksburg, would not be free without the consent of the copyright owner to rebroadcast broadcasts of copyrighted works of the television stations in Pittsburgh, Wheeling or Steubenville, or petitioner's retransmissions of them, WBOY being one

of petitioner's customers. But, see p. 9, *supra*. Nor would there be any reason why petitioner or some other entrepreneur might not receive such broadcasts, and, instead of relaying and distributing them to receiving sets in the homes and commercial establishments of its customers, retransmit them to receiving sets in theatres, auditoriums, meeting halls and assembly rooms, where neighbors might foregather and view them in each other's company, at a price. For, if the public has a "right" to "receive" broadcasts under the Communications Act, and the public's "right" in that regard is superior to the exclusive right of copyright owners publicly to perform their works for profit, as petitioner claims, then there is no reason why the broadcast of a copyrighted work should not be open to such exploitation.[27]

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[27] Petitioner's argument based on § 325(a) of the Communications Act, Pet. B. 80, 81, overlooks two controlling factors pointing wholly the other way. First, as the Federal Communications Commission has made clear, the reason why the Commission doubted whether an extension of that section to cover retransmissions such as petitioner's "would be effective", Pet. B. 81, fn. 105, was that a broadcasting station "cannot bestow broadcasting or transmission rights to programming it does not own (or as to which it has not obtained a license to do so)", *First Report and Order*, 2 FCC 2d 725, 768, 769 (1966), i.e., that a television station normally has no rights in its programming to grant or withhold. Secondly, in rejecting the proposed amendment to expand § 325(a) to retransmissions such as petitioner's, the Senate Committee reported, S. Rep. 923, 86th Cong., 1st Sess., p. 11:

> Your Committee desires . . . to make it crystal clear that in recommending this legislation it is not affecting in any way the private rights which may have existed prior to the enactment of this bill. No such inference should be drawn because of the failure to apply Section 325(a) which would require the community antenna system to obtain the consent of the originating station nor should any such inference be drawn which may have an effect on any private law suit by the inclusion or exclusion of any language in this legislation.

(f) *That the retransmission of a broadcast of a copyrighted work is limited to places within the Grade B contour, so-called, of the station broadcasting such program, does not dispense with the necessity of securing the copyright owner's consent. The Grade B contour concept is wholly irrelevant.* Whether the condition of things last described may obtain anywhere with respect to broadcasts emanating from anywhere, or is limited to the confines of the Grade B contour, so-called, of the broadcasting station, is not a matter of principle, but merely one of degree. In either event, the violence done the Copyright Act is the same, the only difference being the extent of the area in which the violence may be committed.

Moreover, the Grade B contour is not a concept which lends itself to the uses of copyright. It is a mere "rule of thumb", a "theoretical prediction" based on assumptions that may or may not be true in respect of any television station, and, as they do in this case, the facts may fall far short of the predictions. See, pp. 6-8, *supra.* The Grade B contour, furthermore, is a concept of communications regulation which the Federal Communications Commission has devised for administrative convenience, and to meet conditions peculiar to the communications field, without any reference to copyright. The Commission's convenience, or those conditions, may change, indeed they are changing, and for these reasons or any other, the Commission may alter or abandon the contour concept in whole or in part at any time. Clearly, to tie an exception to the Copyright Act, as to which the Federal Communications Commission has no responsibility, to an administrative regulation of the Commission which the Commission can rescind or modify at will, would be a chancy thing for which there is no precedent. Cer-

tainly, too, the inadequacy of the contour lines as a measure for copyright purposes is emphasized by the *caveat* the Solicitor General notes.[28] As the Solicitor General seems to recognize, the adoption of his suggestion, and petitioner's contention in this regard, would be but a prelude to many disputes and much litigation. U.S. Mem. 15, 16.

Nor is it any answer to the unsuitability of the Grade B contour as a measure of copyright, that the Federal Communications Commission will entertain applications to conform a station's Grade B contour to its actual service area. U.S. Mem. 14. The Federal Communications Commission has no jurisdiction over copyright, and it may be doubted whether it would have jurisdiction to entertain applications of this kind from copyright owners, as such. In any event, it would be an anomaly to add to the burdens of an already overburdened administrative agency, new and onerous functions pertaining to rights and obligations under a statute in regard to which it has no statutory duties. The Solicitor General, U.S. Mem. 15, 16, looks to a "case-by-case resolution" of the problems arising when, as is the case here, the Grade B contours of one are more stations overlap the Grade A contour of others. The Solicitor General, however, leaves open whether questions such as these would be resolved by the Federal

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[28] Significantly in the brief for the United States in *U. S.* v. *Southwestern Cable Co.*, No. 363, Oct. T. 1967, it is said, p. 20, fn. 18, that

> The question of *whether the Grade B contours of the Los Angeles stations reach into San Diego was not resolved by the Commission,* since the Commission decided that a hearing was needed in any event to resolve the question of the impact of CATV expansion in San Diego. *It held that the policy considerations are the same whether or not the Grade B contours of the Los Angeles stations reach San Diego.* [Emphasis supplied]

Communications Commission in administrative proceedings, or by the courts in infringement actions. In either event, the unsuitability of the contour concept as a measure of copyright is emphasized.

The Solicitor General, U.S. Mem. 16, calls his proposal one which would effect "a substantial coalescense of communications policy and copyright policy with respect to CATV". But, copyright policy as established by the Congress in the Copyright Act is, expressly, to reserve to copyright owners the exclusive right publicly to perform their works for profit in any manner or by any method whatsoever, and, as this Court said in *Buck,* 283 U.S. at 197, this extends to "*all* public performances for profit". [Emphasis supplied] There has been no Congressional action modifying this policy in any respect whatsoever, and there has been no expression by the Congress of any purpose or intention that copyright policy be modified in regard to CATV, or that it be sacrificed to any extent whatsoever in order to "coalesce" it with communications "policy" for any purpose whatsoever. With the matter in this posture, there is no room for the "coalescense" for which the Solicitor General speaks. *Cable Vision Inc.* v. *KUTV, Inc.,* 335 F. 2d 348, 353 (9th Cir. 1964), cert. denied, 379 U.S. 989.

CONCLUSION

This review does not involve any question whether a license in favor of petitioner may be implied *in fact* from the circumstances. That question the District Court reserved for later trial and determination, A. 104, fn. 19, 166-168, 174; Pet. 9, fn. 4, and has *yet* to be tried. The questions before the Court on this review are, 1) whether in doing what it did, peti-

tioner publicly performed respondent's copyrighted works, and, 2) if so, whether under the Copyright Act or the Communications Act, or "communications policy" or in consequence of some interplay between them, an exception—(whether called a "license" implied in law or something else)—to the unqualified exclusive right of copyright owners publicly to perform their works for profit, as prescribed in the Copyright Act, can or should "be established in law by this Court", U.S. Mem. 4. Respondent believes not.

Contrary to the picture petitioner and its trade association would draw, petitioner's industry plays no David to respondent's industry's Goliath. As petitioner and its trade association must know, the number of customers served by the "average" retransmission system, Pet. B., fn. 7 at 7, is no measure of the financial stature of those who, directly or indirectly, own such systems. Indeed, as petitioner and its trade association are undoubtedly aware, the roster of corporations, directly or indirectly, owning such systems, or having substantial stakes in them, is star-studded with financial giants.[29] While some CATV systems are, of

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[29] E.g., General Electric Co.; Westinghouse Electric Corp.; Time-Life, Inc.; General Telephone and Electronics Union; Teleprompter, Inc.; Triangle Publications, Inc., i.e., the Philadelphia Inquirer; Scripps-Howard Broadcasting Co., Inc., i.e., the Scripps-Howard newspapers; Cowles Communications, Inc. See, *Copyright Law Revision,* Hearings on S. 1006, Subcommittee on Patents, etc., Senate Committee on the Judiciary, 89th Cong., 2d Sess., August 2, 3, 4 and 25, 1966, pp. 237-239; *Hearings on H.R. 4347,* etc., Subcommittee No. 3, H. Committee on the Judiciary, 89th Cong., 1st Sess., Part 2, pp. 1375-1377; *Copyright Law Revision,* 113 Cong. Rec. H3857, at H3880, H3881, April 11, 1967, remarks of Hon. Emanuel Celler; *Television Fact Book,* 1967 Ed., No. 37, Service Volume, pp. 568a-583a. The *Wall Street Journal,* May 8, 1967, p. 9, col. 4, reported the sale to one purchaser of about 4% of the stock of a leading CATV operator, having a market value in the neighborhood of $5,250,000.

course, small, some are not, and the trend appears clearly to point to gigantic systems, if not today, certainly before very long. Thus, it is reported that franchises have been granted for CATV systems in Denver expected to cost some $60 million, and in Philadelphia expected to cost some $37 million.[30] CATV systems now in process of construction on Manhattan Island are reported as having a potential of about 500,000 customers, indicating annual revenues in the neighborhood of $30 million.[31] The potential in CATV is obviously what has attracted great enterprises to it, and the chief executive of one of these is reported to have confidently stated that "in a decade [broadcasting] stations will be receiving network programs via satellite, retransmitting them plus local programs over the air and * * * the cable systems [CATV] will feed all that material to at least 85% of TV homes".[32] Another executive of one of the large enterprises owning CATV systems, is reported to have predicted not so long ago that "by 1985, 46 million homes will be connected to 23,000 CATV systems, serving 110 million people taking in $2.3 billion annually — very likely equaling or exceeding the annual dollar volume of TV broadcasting itself * * * ". He is also reported as foreseeing that "several key production centers may replace hundreds of TV stations".[33]

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[30] *Cable Television Review,* June 12, 1967; Hearings on H.R. 4347, *supra,* fn. 29, Part 2, p. 1350.

[31] *New York Times,* December 4, 1964, p. 46 and November 23, 1967, p. 83.

[32] J. Leonard Reinsch, President of Cox Broadcasting Corp., as reported in *Broadcasting* magazine, January 15, 1968, p. 58.

[33] Roger Clipp of Triangle Publications, Inc., as reported in *Television Digest,* July 3, 1967, p. 2.

Thus, if CATV is free to retransmit broadcasts of copyrighted works without copyright liability in any area, no matter how limited, notwithstanding burgeoning audiences for performances of their works, copyright owners will be met with an ever decreasing market for them as their paying customers are "replaced". In these circumstances, the incentive to create will not be there. Copyrighted material is the staple of television entertainment programming, which is the fare on which CATV feeds its customers. The tragic and ironic consequence of CATV exemption from copyright liability, even if limited to the Grade B contours of the television stations whose broadcasts they retransmit, may well be to discourage the creation of the very programs without which CATV, as it now functions, could not survive.

Respectfully submitted,

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APPENDIX

Copyright Act, Sections 1(c), 1(d) and part of Section 1(e), Tit. 17 U.S.C. §§ 1(c), 1(d), 1(e):

> Any person entitled thereto, upon complying with the provisions of this title, shall have the exclusive right:
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> * * *
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> (c) To deliver, authorize the delivery of, read, or present the copyrighted work in public for profit if it be a lecture, sermon, address or similar production, or other nondramatic literary work; to make or procure the making of any transcription or record thereof by or from which, in whole or in part, it may in any manner or by any method be exhibited, delivered, presented, produced, or reproduced; and to play or perform it in public for profit, and to exhibit, represent, produce, or reproduce it in any manner or by any method whatsoever. The damages for the infringement by broadcast of any work rendered to in this subsection shall not exceed the sum of $100 where the infringing broadcaster shows that he was not aware that he was infringing and that such infringement could not have been reasonably foreseen; and
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> (d) To perform or represent the copyrighted work publicly if it be a drama or, if it be a dramatic work and not reproduced in copies for sale, to vend any manuscript or any record whatsoever thereof; to make or to procure the making of any transcription or record thereof by or from which, in whole or in part, it may in any manner or by any method be exhibited, performed, represented, produced, or reproduced; and to exhibit, perform, represent, produce, or reproduce it in any manner or by any method whatsoever; and
>
> (e) To perform the copyrighted work publicly for profit if it be a musical composition; * * *.

Communications Act, Section 2(a), Tit. 47 U.S.C. § 152(a):

> (a) The provisions of this chapter shall apply to all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States, and to all persons engaged within the United States in such communication or such transmission of energy by radio, and to the licensing and regulating of all radio stations as hereinafter provided; but it shall not apply to persons engaged in wire or radio communication or transmission in the Canal Zone, or to wire or radio communication or transmission wholly within the Canal Zone.